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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LXII.

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PRACTICE REPORTS.

SUPREME COURT.

CLARENCE H. SCHRYMSER agt. ROYAL PHELPS.

Easement — Right of way — Rule of law as to.

Where, after the owner of two adjoining premises, one being an extension in the rear of the other, had established a communication between the front and rear buildings, with an entrance thereto through the front building, the two buildings were sold upon foreclosure of mortgages, the defendant purchasing the front building and the plaintiff that in the rear, and then the defendant closed up the entrance in the hallway between the premises purchased by him and the rear building adjoining: *Held* (in a suit by plaintiff for relief), that the case is not one entitling plaintiff to equitable interference.

In Equity, October, 1881.

John N. Bryan, Francis M. Scott and D. Noble Ronan,
for plaintiff.

George De Forest Lord, for defendant.

LARREMORE, J. — On March 9, 1864, Michael Dillon was seized in fee simple of certain real estate in the city of New York, known by the No. 29 Broadway and Nos. 2 and 4 Morris street. There were then on these premises four buildings, viz.: One on Broadway, about twenty-nine feet nine inches and about fifty-eight feet on Morris street; another abutting the same on the west and extending westwardly about fifty-eight feet eight inches, called the extension; and two others west of the extension, called Nos. 2 and 4 Morris street, being each twenty-five feet wide. A hallway ran from the front building to the extension, in which a swinging door was hung.

On the date last mentioned, Dillon and wife executed two mortgages upon the entire premises, for the sums of \$40,000

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and \$10,000, respectively, which were in November, 1868, assigned to the Mutual Life Insurance Company of New York. Prior to such assignment, and on March 9, 1864, the premises had been conveyed to Paul N. Spofford, subject to said mortgages, who thereupon made several alterations in the interior of the premises, and established a communication between the front and rear buildings, with an entrance thereto from Broadway.

On June 6, 1873, in consideration of \$25,000 paid by Spofford, the Mutual Life Insurance Company released from the lien of said mortgages the front premises by the following description: "All that part of the said mortgaged premises beginning at the corner formed by the intersection of the westerly line of Broadway with the northerly line of Morris street; running thence westerly, along the northerly line of Morris street, about fifty-eight feet to an angle in the wall formed by the division wall between the premises now being described and a building in the rear forming an extension thereof; thence running northwardly, along said division wall, thirty feet, more or less, to the northerly line of said mortgaged premises and land formerly of Garret Van Horne; thence running eastwardly, along said last mentioned land, to the westerly line of Broadway; and thence southwardly along the same, twenty-nine feet nine inches to the point or place of beginning," as shown on a diagram annexed, and being that portion of the said mortgaged premises properly known as No. 29 Broadway; not, however, including the rear building or extension thereof.

Spofford then mortgaged the premises thus released, and substantially by the same description, for \$50,000, to the estate of Richard Adams. This mortgage was subsequently foreclosed and the premises therein described were sold to the defendant. The Dillon mortgages were also foreclosed and the premises covered thereby, except the portion released, were purchased by the Mutual Life Insurance Company, who thereafter conveyed the same to the plaintiff. The defend-

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ant, on or about February 13, 1880, closed up the entrance in the hallway between the premises purchased by him and the rear building adjoining the same. For this plaintiff asks relief, for a removal of the obstructions and restoration of the entrance in dispute, for injunctive process and damages.

The legal questions involved in this case have been the subject of recent examination and adjudication. In *Outerbridge agt. Phelps* (58 *How.*, 77), an elaborate review of the authorities is entered into and a conclusion reached adverse to the application of a tenant of Spofford for relief similar to that herein sought. The only apparent distinction between that and the present suit is found in the fact that the claim of Outerbridge was based on a grant subsequent to that of Phelps. Decisions of courts of competent and co-ordinate jurisdiction should be respected and followed, unless opposed to the rulings of an appellate tribunal.

What have we here, then, as a fresh subject of litigation? The plaintiff as a subsequent purchaser of a part of the premises originally mortgaged, claiming a dominant easement or servitude upon that portion thereof previously conveyed to the defendant. This right is not claimed by actual prescription, but by implication and reservation. To this point the candor and ability of counsel have narrowed the contest. Adopting this view we are relieved of the question as to the division wall, any alleged encroachment upon which by the defendant is not within the grounds of equitable interference.

Tested by the authorities of this state, the plaintiff cannot find a warrant for his claim. *Burr agt. Mills* (21 *Wend.*, 290) is fatal to the doctrine of implied reservation.

Lampman agt. Milks (21 *N. Y.*, 505) was an extreme case, in which the plaintiff's land would have become valueless if the overflow of water had been allowed. This fact must not be overlooked in the application of the principles therein enunciated, which have not been extended by any subsequent authority (see *Butterworth agt. Crawford*, 46 *N. Y.*, 349). But applying the rule thus laid down in its broadest

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sense, it will not be found conclusive as to defendant's rights.

Granted, then, that where the owner of an entire tenement sells a portion thereof, the purchaser takes the same with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the property retained by the grantor; that whatever is in use for the portion sold as an incident or appurtenance passes with it (*Huttemeir agt. Albro*, 18 N. Y., 48), and that this rule is declared to be reciprocal as between grantor and grantee. But in what sense can the defendant be said to be a grantee of Spofford? Surely not by operation of law in purchasing the premises in question on the foreclosure of a mortgage given by him, in which no reference to or any reservation of any easement is made. Nor can the theory be upheld that the assignee of the Dillon mortgages had any other or greater interest in the premises covered by them than the mortgagee originally had. There was no reservation in the release of the portion subsequently purchased by the defendant, and unless the easement claimed was apparent and necessary, it did not pass as an incident or appurtenant.

Notwithstanding the extensive alterations of the entire premises made by Spofford with a view to their greater convenience and profit, no grantee of his is chargeable with notice thereof as shown by the record. Nor did this action on his part create such a severance of the premises as to raise the presumption of an easement as against this defendant, who does not claim through him. For this reason it would appear, in the absence of proof of any ancient right, that the question of an easement apparent and necessary is unimportant. But the line of argument on this point is inviting, and claims some consideration in the ultimate disposition of the case.

All that plaintiff asks is a continuous right of way or entrance, through the main hall of defendant's premises, to Broadway. But a right of way belongs to the class of dis-

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continuous easements (*Parsons* agt. *Johnson*, 68 *N. Y.*, 64; *Fetters* agt. *Humphreys*, 3 *C. E. Green*, 261; *Worthington* agt. *Gimson*, 6 *Jurs.*, *N. S.*, 1053). It is not pretended that the plaintiff has or can have no entrance to his premises except in the manner claimed, nor that any absolute necessity supports such claim, but that its maintenance is necessary for the full enjoyment of his property (*Simmons* agt. *Cloonan*, 81 *N. Y.*, 557). Unless this later authority is entirely misunderstood, it is but a reaffirmation of previous adjudications upon the point in dispute.

To plaintiff's demand that, with a right of entrance from Broadway, his property would be doubly enhanced in rental value, the defendant replies: "You have no such prescriptive right; I have been neither party nor privy to such an implied right; I cannot consent that my property shall be burdened forever with a servitude that yields me no benefit and fixes a perpetual incumbrance upon it."

The facts disclosed do not establish a case for equitable interference, and the defendant is entitled to judgment in his favor.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* CHARLES ROSEKRANS agt. JOSEPH B. CARR, secretary of state of the state of New York.

Office and officer — Surrogate of New York city and county — Term of office.

By the Constitution of 1846 (*art. 6, sec. 14*), the office of county judge for every county in the state, except the city and county of New York, was created, and the person elected thereto was to hold it for four years. The same section and article of the Constitution, without prescribing the term and duration of the office of surrogate, provided: "In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to perform the duties of surrogate." By chapter 448 of the Laws of 1847, the legislature provided for the election of surrogate (also a recorder) of the city

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- and county of New York. The first election of such officer was to take place in November, 1848, and the term of office was to be "three years from the first day of January next after said election." The act also provides that in case a vacancy occurred, "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had become so vacant." By chapter 292 of the Laws of 1869, it was provided, that "the term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York, shall be six years." In 1869, article 6 of the Constitution was then changed and altered in many particulars. By section 15 of that article, it is now provided: "The existing county courts are continued, and the judges thereof in office at the adoption of this article, shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years. * * * The county judge shall also be surrogate of his county; but in counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge." At the general election held in November, 1875, V. S. was elected surrogate in place of H., whose term of office was to expire on the 31st day of December, 1875. Had V. S. lived, his term of office would have expired January 1, 1882. He died in April, 1876, and on the twelfth of the same month C. was appointed to fill the vacancy by the board of aldermen of New York, acting as supervisors. At the general election held in November following, C. was elected surrogate by the electors of the city and county of New York:
- Held*, 1. That the election of C. to the office of surrogate at the general election in November, 1876, entitles him to hold the office for the full term of six years from January 1, 1877.
2. That the act of 1869 is repugnant to and inconsistent with the act of 1847, not only as to the general term of the office, but also to so much of that law as provides that the election, when a vacancy has occurred other than by the expiration of the full term, shall only be for the unexpired term, and consequently repeals that of 1847 in both these particulars, and while not rendering the election to fill the office unnecessary, it changes the effect thereof, so as to confer a full and not a broken term.
3. That the act of 1869 and the constitutional enactment (*art. 6, sec. 15*), which was adopted in 1869, effectually and clearly provide that an election by the people to the office of surrogate, can only be for the term of six years; and that consequently the term of Mr. C., as surro-

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gate of the city and county of New York, will not expire until January 1, 1883, and that the secretary of state was right in omitting to give notice of any election to fill that office at the coming November election.

4. That the constitutional provisions, as amended in 1869, apply to the surrogate of the city and county of New York.

Special Term, October, 1881.

MOTION to compel the secretary of state to include the surrogate in his notice of officers to be elected at the coming general election in the city and county of New York.

James M. Lyddy, for motion.

William B. Ruggles, deputy attorney-general, opposed.

WESTBROOK, *J.* — The order to show cause in this proceeding was returnable at a special term, to be held in the third judicial district, at Kingston, on the 29th of September, 1881, but was, by consent, heard in the city of New York on that day.

In regard to the facts there is no dispute; and upon the argument it was agreed that the only question to be determined was: Is there a surrogate to be elected in and for the city and county of New York at the coming general election in November next? The very limited time at my disposal necessitates the shortest possible discussion of the legal problem submitted.

At the general election held in November, 1875, Stephen D. Van Schaick was elected surrogate of the city and county of New York in place of Robert C. Hutchins, whose term of office was to expire on the 31st day of December, 1875.

Van Schaick entered upon the discharge of the duties of the office on January 1, 1876, and his term, had he lived, would have expired January 1, 1882. He departed this life, however, in April, 1876, and after his death, and on the 12th day of said month of April, Delano C. Calvin was appointed to fill the vacancy by the board of aldermen of New York,

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acting as supervisors. At the general election held in November following, the said Calvin was elected surrogate by the electors of the city and county of New York. The point which the motion presents is: Does such election entitle Calvin to hold the office for the unexpired term of Stephen D. Van Schaick, deceased, or for the full term of six years? If the election gave to him only the remainder of the term of Mr. Van Schaick, then, under the stipulation of counsel in open court, the order asked for must be granted; if, however, he took by such election the full term of six years, the motion must be denied.

By the constitution of 1846, as originally adopted, and as it existed for several years, the office of county judge for every county in the state, except the city and county of New York, was created, and the person elected thereto was to hold it for four years (*Article 6, section 14*). The same section and article of the constitution, without prescribing the term and duration of the office of surrogate, provided: "In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to perform the duties of surrogate." And by section 12 of article 14, it was provided: "All local courts established in any city or village, including the superior court, common pleas, sessions and surrogate's courts of the city and county of New York, shall remain until otherwise directed by the legislature, with their present powers and jurisdictions; and the judges of such courts, and any clerks thereof in office on the first day of January, one thousand eight hundred and forty-seven, shall continue in office until the expiration of their terms of office, or until the legislature shall otherwise direct."

By chapter 488 of the Laws of 1847, the legislature provided for the election of a surrogate (also a recorder) of the city and county of New York. The first election of such officer was to take place in November, 1848, and the term of office was to be "three years from the first day of January next after said election." The act also provides that in case

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a vacancy occurred, "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had become so vacant."

In 1869 another act was passed (*chapter 292 of the laws of that year*), entitled "An act to fix the duration of the term of office of the recorder, city judge and surrogate in the city and county of New York," the whole of which was contained in one short section, reading as follows: "The term of office of the persons who shall hereafter be elected to the office of recorder, city judge, and surrogate, respectively, in the city and county of New York, shall be six years."

What effect did this latter statute (that of 1869) have upon that of 1847? Unquestionably to repeal and change such provisions of the law of 1847 as were necessarily and absolutely inconsistent with it. There is no dispute as to the existence of a legal rule that repeals by implication are not favored in the law, and that, if consistently with the plain words of the latter statute, the older statute can stand, it shall be so adjudged. Whilst, however, this general principle is conceded, it is also true that, in all particulars in which two statutes are repugnant, the former and the older must give way to the later. No authorities are cited in support of these propositions, for they are too familiar and elementary to need any. We proceed, then, to consider in what respects the law of 1869 is absolutely inconsistent with and repugnant to that of 1847.

That the general and usual term of the office is extended from three to six years is conceded, but it is contended that this is not the case when a vacancy has occurred "by death, resignation or otherwise," and that the act of 1869 should be limited in its effect to elections held to fill a full term. The difficulty with this construction is that it ignores plain words. Who, according to the law of 1869, are to hold the office of

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surrogate for six years? The answer is, giving it in the very words of the law: "The persons who shall be hereafter elected to the office." The phraseology will be observed. No exception is made to the general and sweeping provision. It reads: "The term of office of the persons," not of some, but of all, and therefore of each and every one, "who shall be hereafter elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York shall be six years." When language is so plain, it is difficult to elaborate, and the attempt will not be made. Manifestly, the act of 1869, as it is repugnant to and inconsistent with the act of 1847, not only as to the general term of the office, but also to so much of that law as provides that the election, when a vacancy has occurred other than by the expiration of the full term, shall only be for the unexpired term, repeals that of 1847 in both these particulars, and while not rendering the election to fill the office unnecessary, it changes the effect thereof, so as to confer a full and not a broken term. This result necessarily follows, because, as before stated, all "persons" elected after the passage of the act of 1869 must be elected for six years.

Perhaps a word or two should be added in answer to the argument, that because the act of 1847 provided, first, for an election to a full term; second, for the temporary filling of a vacancy, and, third, for an election to fill the unexpired part of the original term; that, therefore, the act of 1869 should be read as though it simply amended the first section of that of 1847 as to the duration of the entire term. The difficulty with this argument is, that the law of 1869 is not an amendatory statute, which must be read as a part of the original enactment, but is one entirely independent thereof, and adopted years after the other was passed. As the law was at the time of its adoption, there were, it is true, two kinds of an election to fill the office, one for a full term and another for a vacancy. This was a clear evil to be remedied, for it subjected electors and candidates alike to the expense of more

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frequent elections than were necessary. The act of 1869, therefore, distinctly provided that the term of office of all persons thereafter elected to the office of surrogate should be six years. This is so unequivocally stated that it seems difficult to argue. The election "to the office," to use the words of the law, gives a term of six years; and when it can be shown that Mr. Calvin has not been elected (repeating exact language) "to the office of * * surrogate," but to something other than the office itself, the argument in favor of an election for an unexpired term may prevail. Nether is the title of the act of 1869—"An act to fix the duration of the term of office of the recorder, city judge and surrogate in the city and county of New York"—antagonistic to the construction just given to the law itself. The title is as general as are the provisions of the statute. Reading the act and its title together, it is clear that its intention was, in all cases of an election "to the office," to confer a full and not a broken term, because, as there are no words of restriction in the title limiting the force of the language employed in the body of the law, full effect must be given to its words, which declare "the term of office of the person who shall be hereafter elected to the office of recorder, city judge, and surrogate respectively, in the city and county of New York shall be six years." A plain and positive declaration of this character should not be reasoned away by specious suggestions as to the legislative intent. Such intent is to be sought for in the words employed and only when they are doubtful is such reasoning sound (*Potter's Dwarries on Statutes*, 182, 183). If an election "to the office of * * * surrogate," which occurred after this law took effect, is held to confer only a broken term, such decision overrules the legislative mandate, which declares that the term of office of the person thus elected "shall be six years."

Upon the statutes of the state, then, it is clear that Mr. Calvin must have been elected to the office of surrogate for the term of six years. A new constitutional provision, however, was adopted in 1869, and to that reference will now be

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made. Article six of the constitution was then changed and altered in many particulars, and among such alterations will be found one in regard to county judge and surrogate. By section fifteen of that article it is now provided, "the existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years. * * * The county judge shall also be surrogate of his county; but in counties having a population exceeding 40,000, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge."

It may be observed of this constitutional provision, as was said of the act of 1869, that it is difficult to employ language more specific. The officer called a surrogate, "in counties having a population exceeding 40,000," is, as the old judiciary article in the constitution of 1846 also provided, allowed to be elected by legislative enactment; but now such legislation is expressly limited and confined to a law providing only "for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge," which is six years, and six years only. With this plain language for our guidance, where is the authority to elect for any term less than this? The "successors" (as the word is plural it means each and every successor) of the county judges in office, when the amendment of 1869 took effect, were required to "be chosen by the electors of the counties for the term of six years," and the legislature, while permitted to pass a law requiring the election of a surrogate in counties having a population exceeding 40,000, could only enable the electors to choose one "whose term of office" should "be the same as that of the county judge." Necessarily and plainly, then, the election held in November, 1876, filled the office of surrogate for the city and county of New York for the term of six years, and any statute allowing or permitting an elec-

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tion for a less term, if not repealed and changed in that particular by the act of 1869, was clearly as to the duration of the term conferred by the election held thereunder, nullified and made void by the amendment to the constitution.

It was, however, argued that the constitutional provisions just referred to do not apply to the surrogate of the city and county of New York, who it is claimed was an officer older than the constitution of 1846, and continued by section 12 of its fourteenth article hereinbefore given. Certain it is, that prior to the constitution of 1846, not only the city and county of New York had a surrogate, but so also had every other county in the state (1 *Edmund's Statute*, 88). The former was retained by constitutional enactment, and the latter were allowed to be continued in counties, the population of which exceeded 40,000, if the legislature should so provide. It is further conceded that under the original constitution of 1846, the duration of the term in both cases vested in legislative discretion. The question, however, now is, when the new judiciary article (article 6) was adopted in 1869, did such legislative discretion, as to the duration of the term, terminate in both cases, or was it continued as to the one, and repealed as to the other? It will be readily admitted by every reader of the instrument, that as to certain local courts section 12 of article 14 of the constitution (which is the one relied upon to prove that the term of a surrogate in New York is subject to the legislative will) is interfered with. Section 12 of the new sixth article does certainly make new and explicit provisions as to the "superior court of the city of New York, the court of common pleas of the city and county of New York, the superior court of Buffalo and the city court of Brooklyn." Section 25 also places the term of all incumbents of the office of surrogate at the time of the adoption of the article beyond the control of the legislature by expressly declaring that "surrogates," and certain other judicial officers therein named, "in office when this article shall take effect, shall hold their respective offices until the

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expiration of their terms." As clearly, in these particulars, by necessary implication, section 12 of article 14 is changed, is that portion of section 15 of article 6 (the new judiciary article), which it is conceded abolishes the legislative discretion as to the duration of the term of the office of surrogate in all counties, except the city and county of New York, to be construed as confined to them only; or is it to receive a broader interpretation as fixing all over the state, without any exception whatever, the duration of the term? The former construction involves the thought that permanency in the office for a stated and unalterable term was sought to be attained in every county except in the one in which it was most needed, and the further and equally absurd one that, while the term of the incumbent holding the office at the time of the adoption of the article was fixed in every county, and the term of every successor of every incumbent all over the state, except in the city and county of New York, was definitely fixed at six years, that of the successor of the incumbent in that locality was unprovided for. If New York city and county, as to the duration of the future terms of its surrogates, were to be left to the legislative will, why was it not excepted from the operation of the clause (section 25 of article 6) which secured to incumbents in office their positions until the expiration of their respective terms? Why was the holder of an office, whose term was probably almost expired by lapse of time, made secure in his place, whilst all successors would continue in office only during the legislative will? This reasoning necessarily forces the conclusion that the framers of article 6 supposed that they had by its fifteenth section, in all cases given a distinct and clear term of office to the person elected surrogate, by declaring that when a legislative enactment provided for the election of a surrogate "his term of office shall be the same as that of the county judge," and, therefore, as it was necessary also to declare when those thereafter elected should take office, they provided, making no exception, that all incumbents of the office at the time of the adoption of the article,

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should hold it until the expiration of their respective terms. This view harmonizes the entire instrument, and secures that which is known to have been one of the objects of the article, permanence and security in judicial positions.

It may properly be added that there is nothing in section 12 of article 14 of the constitution repugnant to the view just expressed. The local courts therein mentioned were continued, and "the judges" thereof (of whom the surrogate was one) and their "clerks" "in office on the 1st day of January, 1847," were continued "in office until the expiration of their terms of office, or until the legislature shall otherwise direct." The amended judiciary article of 1869, after the section just quoted, had fulfilled its object as to the judges then in office and their successors up to that date, continues the legislative power to provide for an election, but declares and defines the term, thereby removing all legislative discretion as to the duration thereof, and places all surrogates in the state upon an equality as to their continuance in office. It is true that New York has no officer styled a county judge, but the constitution, when it declares that the term of surrogate shall be the same as that of the county judge, means, when it speaks of the latter, the officer of that title created by the instrument, and not one who must reside in the county in which there is a surrogate to be elected.

Thus far no comment has been made upon section 16 of article 6 of the constitution, under which it is claimed an election to fill a vacancy, as the act of 1847 unamended by subsequent statutory or constitutional enactments requires, might be upheld. That clause simply empowers the legislature, on the application of the board of supervisors, "to provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability or of a vacancy, and to exercise such other powers in special cases as may be provided by law." It clearly has no reference whatever to the filling of either office, if the same is vacant, but only, as it plainly

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declares, to the election of "local officers," who in cases of "inability" or "vacancy" shall "discharge the duties of county judge and of surrogate." The power of the legislature to provide for the election of a surrogate by the electors of a county remains unimpaired, and consequently the act of 1847, requiring the election of such an officer, but altered and changed by the act of 1869 and the constitution itself as to the duration of the term when such election is had, remains in full force and effect. It may be proper in this connection to observe that the authority given by the act of 1847 to the board of supervisors to fill the office of surrogate, in case of a vacancy, until the next general election, was continued by section 5 of article 10 of the constitution, which authorizes the legislature "to provide for filling vacancies in office."

It will be unnecessary to consider the act of 1871 (*chapter* 859), because its provisions manifestly do not apply either to the city and county of New York or to the county of Kings, and if they did, they could not abridge the term of the office as prescribed and fixed by the constitution.

In reaching the conclusion that this application for a *mandamus* must be denied, I have not deemed it necessary to fortify clear language by citing adjudications upon words of similar import. If reference is made to *The People agt. Green* (2 *Wend.*, 266, 272); *People agt. Coutant* (11 *Wend.*, 132), and to the same case in the court of errors (11 *Wend.*, 511), it will be found that my reasoning is abundantly sustained. It seems to me, however, that the act of 1869 and the constitutional enactment (*article* 6, *section* 15), are their own best interpreters, and that they effectually and clearly provide that an election by the people to the office of surrogate can only be for the term of six years; and that consequently the term of Mr. Calvin as surrogate of the city and county of New York will not expire until January 1, 1883, and that the secretary of state was right in omitting to give notice of any election to fill that office at the coming November election.

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In closing this opinion a word should be added upon the case of (*The People* agt. *McKinney*, 41 *Barb.*, 515), upon which the counsel for the relator places much reliance. If, however, the opinion of judge BALCOM be carefully read in connection with chapter 179 of the Laws of 1856, which act was the subject of controversy, it will be found that no principle in conflict with anything herein contained was therein enunciated. The point upon which the present opinion depends is, that both the statutes and the constitution of this state give a six years term to any person elected by popular vote to the office of surrogate, and that such an election for a shorter period is now, and was in 1876, a legal impossibility. The act of 1856 (*chap.* 179), however, which created the office of "school commissioner," the title to which in the county of Chemung, the case reported in 41st Barbour was designed to settle, did not declare that every election by the people should give a full term of three years. On the contrary (*see section 7*), it was those who were chosen "at the annual general election, held in the year one thousand eight hundred and fifty-seven, and every three years thereafter," who were to "hold office for three years, and until their successors shall have qualified according to law," and nowhere in the law was this length of term given to any others. The court, therefore, very properly decided that an individual chosen, not at a triennial election, but under one held by virtue of section nine, which provided that in case of a vacancy the county judge should appoint "a successor to fill such vacancy, till the next following general election, when a successor shall be chosen as hereinbefore provided," should hold the office only for the unexpired term of his predecessor. This conclusion was inevitable because section seven required an election to be held in 1857, "and every three years thereafter," to fill the office, and this general and plain provision would have been defeated if the election held under the ninth section was adjudged to confer a full term. The court, therefore in construing the statute, decided that section seven provided for an

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election giving a full term, and section nine contained the scheme for filling a vacancy. It is true that the latter section, after providing for an appointment by the county judge "of a successor to fill such vacancy till the next following general election," declared that at such general election a successor should "be chosen by the electors, as hereinbefore provided;" but such provision referred only to the mode and manner of its conduct, and not to the effect flowing from it. It is evident, therefore, that the act of 1856 provided for two kinds of election by popular vote — "one every three years," which gave a full term, and another to fill a vacancy. No similar provision exists, or can now be made by the legislature, in regard to the office of surrogate. It is nowhere declared, either in the statutes or in the constitution of the state, that an election shall be held every sixth year to fill the office, but, on the contrary, both statute and constitution affirm that every election by popular vote gives a full term of six years, and nothing less.

The formal announcement that this motion must be denied, in view of what has already been said, seems to be superfluous. It is made to say, in connection therewith, that as the question presented is one of public importance, in which the relator has no personal interest, and which should be judicially settled for the benefit of all persons interested in the administration of justice in the city and county of New York, such denial is without costs.

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SUPREME COURT.

THE PEOPLE *ex rel.* CHARLES ROSENKRANS agt. JOSEPH B.
CARR, secretary of state.

Surrogate of New York county — his term of office.

A vacancy occurring in the office of surrogate of the county of New York by the death of one V. S., who had been elected at the general election in November, 1875, and whose term of office would have expired January, 1882, but who died in April, 1876, and on the twelfth of the same month C. was appointed to fill the vacancy by the board of aldermen of New York, acting as supervisors. At the general election held in November following, C. was elected surrogate by the electors of the city and county of New York:

- Held* — 1. That the election of C. to the office of surrogate at the general election in November, 1876, only entitles him to hold the office for the unexpired term of V. S., which will terminate with the year 1881.
2. That the act of 1869 simply enlarged the term of office to six years, leaving in full force the provisions of the act of 1847, for filling vacancies caused by death, resignation or otherwise.
3. That the constitutional provisions as amended in 1869 do not apply to the surrogate of the city and county of New York.
4. That Mr. C., under the existing provisions of the constitution and the statutes relating to the office of surrogate, is only entitled to hold said office for the unexpired term of V. S., which will terminate with the year 1881 (*Reversing S. C., ante, 5*).

General Term, October, 1881.

Before DAVIS, P. J.; BRADY and DANIELS, J. J.

APPEAL by the relator from decision denying motion for a peremptory *mandamus* to compel the secretary of state to include the surrogate in his notice of officers to be elected at the coming general election in the city and county of New York.

James M. Lyddy, for appellant.

Wm. B. Ruggles, deputy attorney-general, for respondent.

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DAVIS, *P. J.*—The relator, as a citizen of the United States and of the state of New York, and a resident and elector of the city and county of New York, moved, at special term, for a *mandamus* to require the respondent, who is the secretary of state of the state of New York, to include in the election notice, required to be published by statute, the office of surrogate of the city and county of New York, claiming that the office of the present incumbent will expire with the year 1881, and that a surrogate is to be elected for a succeeding term of six years. The question presented by the motion is whether the present incumbent, under the existing provisions of the constitution and statutes relating to that office, was elected for a full term of six years, or to fill a vacancy caused by the death of Stephen D. Van Schaick, who was elected to a full term of six years at the general election of 1875, and entered upon the duties of his office on the 1st of January, 1876, and died in April following.

Upon the death of Mr. Van Schaick, Delano C. Calvin, the present incumbent, was appointed by the board of aldermen of the city of New York, acting as supervisors, under the provisions of chapter 448 of the Laws of 1847, to fill the vacancy caused by such death "until the general election next ensuing." At the general election in November, 1876, Mr. Calvin was elected to the office, as appears in the papers presented, "in place of Delano C. Calvin, appointed in the place of Stephen D. Van Schaick, deceased." The relator contends that this election conferred on Mr. Calvin only the residue of the unexpired term of Stephen D. Van Schaick, which will terminate with the year 1881. The respondent insists that it conferred on Mr. Calvin a full term of six years, which will expire with the year 1882. So far as the question is controlled by statutes, it depends upon the provisions of chapter 448 of the Laws of 1847, and chapter 292 of the Laws of 1869. Chapter 448 of the Laws of 1847 provides as follows :

"SECTION 1. There shall be elected at the general annual election in and for the city and county of New York, held in

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the month of November, in the same manner that the other city and county officers are elected, a recorder and surrogate for said city and county, who shall hold their respective offices for the term of three years from the first day of January next after said election.

“SECTION 3. In case a vacancy shall occur in either of said offices, by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had so become vacant.”

These sections clearly provided for several distinct things: First, the electing of a surrogate and the fixing of his term of office; second, the filling of a vacancy caused by death, resignation or otherwise, by an appointment to be made by the board of supervisors “until the general election next ensuing the happening of such vacancy,” and then by an election for “the unexpired term of the officer whose term had so become vacant.” The provision which fixes the term of the office, and those providing for filling a vacancy occurring during a term, are so clearly distinct and independent that a repeal or modification of either has no necessary effect upon the other; and especially would this be the case where the supposed repealing act left the system of the statute untouched in most of its general features, and directed itself to a single one of them. The act of 1869 (*chap.* 292, *Laws of* 1869) contains but one section. The title is, “An act to fix the duration of the term of office of the recorder, city judge and surrogate in the city and county of New York.”

This is one, and but one feature of the system created by the statute of 1847, for filling the office of surrogate. The duration of the term of office is fixed by that statute at three years. In 1869 the legislature, having in view that term, and intending, as declared by the title of the act, to “fix” it at a different and longer term, enacted that “the

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term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate respectively, in the city and county of New York, shall be six years." There is in this brief enactment no express repeal of any portion of the statute of 1847. It therefore repeals by implication only so much of the provisions of that statute as are necessarily and absolutely inconsistent with it; and it falls within the rule that "repeals by implication are not favored in the law, and that if, consistently with the plain words of the later statute, the older statute can stand, it shall be so adjudged."

Aided by the index given by the title of the act, we have no difficulty in discerning that its sole object was "to fix the duration of the term of office," and then collating its single section with the first section of the former statute, we at once see that the only change made is in that part of the section which fixes such term. The former statutes does it in these words: "Who shall hold their respective offices for the term of three years from the first day of January next after such election." The later statute does it by these words: "The term of office of the persons who shall be hereafter elected * * * shall be six years." It seems to us perfectly apparent that this provision was not intended to repeal or abrogate any portion of the provisions relating to the filling of accidental vacancies. The periods for which that class of vacancies is to be filled are not regarded by either act as "terms of the office." They are provided for as something different in their nature and requiring independent legislation, attention and regulation; and the best argument that can be made against the contention that they are repealed or changed is that the legislature, in fixing the term of the office of surrogate by the act of 1869, left them entirely alone.

This view is greatly strengthened by observing what provisions of the act of 1847 remain unquestionably intact. In the first section the portion that provides for the election of a surrogate, and prescribes the time and manner of such elec-

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tion, are left in full force, and the portion which declares that the term shall commence from the first day of January next after said election was undoubtedly intended to be preserved. But no such provision is contained in the act of 1869. That act simply declares that the term of office of persons who shall hereafter be elected * * * shall be six years. Six years from when? To answer that question we must resort to the first section of the act of 1847, and by force of the latter enactment, in place of the words "who shall hold their offices for three years," read "the terms of office of persons hereafter elected shall be six years from the first day of January next after such election," and we have the manifest purpose of the legislature. It is not easy to see what intention of the act of 1869 is not fully answered by this view. If we look at the third section of the act of 1847, it appears clearly that the part relating to filling vacancies by the board of supervisors cannot be affected. They "are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy." It was under this provision that Mr. Calvin was appointed, and he held the office under it until the next general election. As soon as that election was completed by the final canvass and announcement of his election by the board of county canvassers, his appointment by the supervisors ceased, and he held by virtue of his election. He could not hold by his appointment until the first day of January next ensuing, for the statute declares otherwise. If he took by that election a term of six years, under the act of 1869, there must either have been an absolute interregnum in the office from the time of the completed election until the first of January following, or his term of six years commenced at the time his election was consummated by the final canvass and certificate. In the latter case, his term will expire and another vacancy will ensue of a month or more in 1882. Surely the legislature had no such thing in contemplation, nor had the people of this city when they voted for him to succeed to the unexpired term of Mr. Van Schaick, deceased.

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But we avoid all possible confusion in construing these statutes when we regard that of 1869 as simply enlarging the term of the office to six years, leaving in full vigor the provisions of the act of 1847 for filling vacancies caused by death, resignation or otherwise. Great stress is laid by the court below upon the words "the term of office of the persons who shall be hereafter elected to the office of * * * surrogate shall be six years," arguing that these words indicate an intention to cover every election of a person to perform the duties of the office, whether for a full term or an accidental vacancy. But so did the first section of the act declare with equal emphasis that persons elected under its provisions "shall hold their offices for the term of three years from the first day of January next after such election;" yet no one thought of claiming that if the election of the surrogate was made after the death of an incumbent there was any inconsistency between the declaration of the first section that a person elected surrogate shall hold for three years, and the provision that one elected to an unexpired term when a vacancy occurs by death shall only fill out the term of his predecessor.

The fallacy of the argument grows out of the failure to observe that the statutes recognize a clear distinction between an election "to the office" of surrogate and an election to fill a vacancy that has occurred by death in the office. When this distinction is borne in mind, all conflict between the statutes disappears, and no hiatus in the office can exist and no difficulty arise as to the period for which any incumbent is chosen.

But it is contended that certain provisions of the constitution affect the question. We are not able to perceive any soundness in this position. There is no provision of the constitution which provides for filling vacancies "by death" in the office of surrogate of this city and county. It may be laid down as an indisputable proposition, that where the constitution creates or recognizes an office and prescribes its term, but fails to provide expressly, or by necessary implication,

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what period and in what manner vacancies occurring (except by lapse of terms) shall be filled, such vacancies are the subject of legislation, and may be provided for and regulated by statute. There is no incongruity between such legislation and the constitution. The provisions of the constitution referred to by the court below and relied upon by counsel, have, in our opinion, no application to the case before us. By section 15 of the present judiciary article (*article 6 of the constitution*), it is provided that "the existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years. The county judge shall also be surrogate of his county; but in counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge." It is under this provision, of course, that all the counties which have county courts are provided also with surrogates. In all of them the county judge is, by the constitution, made surrogate; and there is and can be no other surrogate unless the legislature choose to provide for the election of a "separate officer to be surrogate;" and in cases where that is done, the term of office of such officer is the same as that of the county judge whom he supersedes in the duties of the office. But the city of New York never had a county court or a county judge within the meaning of the fifteenth section. Nor has a "separate officer" ever been provided for and elected to be surrogate under its provisions. The office of surrogate of the city and county of New York existed long prior to the present constitution by operation of laws not complicated in any wise with the system of county courts and county judges as recognized or created by the constitution for other counties of the state. The surrogate of the city is not elected to perform duties which otherwise devolve on a county judge because the population exceeds 40,000. The constitu-

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tion did not abrogate the office nor interfere with the laws which created it, but by section 12 of article 14 provided that the "surrogate's courts of the city and county of New York shall remain, until otherwise directed by the legislature, with their present powers and jurisdictions," and the judge of such court and any clerk thereof in office on the 1st day of January, 1847, continue in office until the expiration of their terms of office or until the legislature should otherwise direct.

We have seen by the act of 1847, already so often referred to, what the legislature did provide for shortly after the amended constitution of 1846 was adopted. There is, therefore, no force whatever in the suggestion that because county judges and "separate officers" under section 15 of article 6 have a term of office fixed by that provision, the office of surrogate in New York is regulated by it. We are, therefore, of the opinion that the present surrogate of the city was legally elected to fill the vacancy caused by the death of Mr. Van Schaick, as it appears was intended by the voters, and that it was the duty of the respondent to have given notice of an election of a successor to that office.

The motion should have been granted, and the order of the court below is, therefore, reversed and an order entered directing the issuing of such writ.

No costs are awarded to either party.

Thurber agt. Minturn.

SUPREME COURT.

HORACE K. THURBER, &c., as assignee, &c., agt. ROBERT B. MINTURN and another.

Mortgage upon a building, "machinery and effects" — what it includes — Words, "ejusdem generis."

Where a mortgage was made of certain real property used for a sugar refinery, "and also all the machinery and effects in the said sugar refinery," and was recorded as a chattel mortgage:
Held, that the mortgage covered the sugar upon the premises.

Special Term, August, 1881.

Nelson Smith, for plaintiff.

D. S. Walden, for defendant North River Bank.

Joseph H. Choate, for defendant Minturn.

VAN VORST, *J.* — There is in fact only one question in this case, and that is whether the mortgage from Harms and wife to Minturn covered the "sugar" upon the premises.

The mortgage is in the form used to affect real property, but the description of the land mortgaged is followed by the words, "and also all the machinery and effects in the said sugar refinery." The instrument was filed as a chattel mortgage in Kings county register's office.

The parties to the action who contest the right of the defendant Minturn to the sugar and its proceeds, under his mortgage, insist that the description of the property mortgaged does not include the sugar in the refinery. The word "effects," in its primary and accustomed sense, certainly would cover the sugar. Had the description been simply "and also all the effects in the refinery," I suppose there would have

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been no question but what it would have included both the sugar and machinery.

The primary meaning of the word "effects" is sought to be cut down on account of its connection with the preceding word "machinery," under a rule of frequent application in construction, where general words follow a particular one, and where they have been held to be "*ejusdem generis*." The counsel for the parties who contest Minturn's right have cited numerous cases in which the construction of clauses in wills and contracts was involved; but the present case I do not think is logically within them (*Rawling* agt. *Jennings*, 13 *Ves.*, 39; *Hotham* agt. *Sutton*, 15 *Ves.*, 319; *Van Hagen* agt. *Van Renssleer*, 18 *John.*, 428, and others were so cited).

The creditor Minturn was endeavoring to secure a large debt, and he took from his debtor—who was so much embarrassed that he, within a few days thereafter, made a general assignment—a mortgage. He had only the sugar refinery, already heavily incumbered, with its contents, with which to secure the creditor. He gave an instrument which by its terms created a lien upon the refinery, the machinery and "effects" therein, in favor of the creditor.

I see no reason why the creditor should be deprived of his security to its full extent, and the court should not be astute in searching out technical grounds by which the rights of the vigilant creditor should be pared away. It appears to me that the intention was that the sugar should be included. I can discover nothing to the contrary in the words or acts of the parties or in the circumstances. In the structure of the sentence there is evidently an ellipsis of frequent occurrence.

By inserting the two words "all the" before the word "effects," as they occur before the word "machinery," and the doubt, if any, is removed, and the intentions of the parties effectuated clearly.

The plaintiff's counsel, however, urges that the mortgage was fraudulent because it was not followed by an immediate change of possession, and for the reason that the mortgagor

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was allowed to sell some of the sugar. This contention of course concedes that the "sugar" was included in the mortgage. No fraud is, however, set up in the complaint. The mortgage was duly filed. But waiving such omission in the pleading, I discover no fraud in the case, and I fail to find any reason in law or equity which would deprive the defendant Minturn of his claim to the sugar and its proceeds. The attachment of the North River Bank was levied after the filing of Minturn's mortgage, and the general assignment was subsequent to both mortgage and attachment.

Judgment is ordered awarding the money, the proceeds of the sugar, to the defendant Minturn. But as this action was commenced with the consent of all the parties, to determine their respective rights, the costs of all the parties should be paid out of the fund.

SUPREME COURT.

ALICE DOUGLASS agt. JOHN L. HABERSTRO, as Sheriff of the County of Erie.

When and how exceptions taken upon a jury trial may be heard in the first instance at general term — Final judgment not stayed by motion for a new trial — A formal order must be entered — Code of Civil Procedure, sections 1000-1005.

An order sending the exceptions to the general term to be heard in the first instance does not suspend the entry of judgment, unless the order as entered also provides for the suspension of judgment upon the verdict.

The motion to be made in the general term is for a new trial on the exceptions, and all that court has power to do is to grant or refuse the motion.

Erie County Special Term, August, 1881.

MOTION to vacate the judgment entered February 19, 1881, and the execution issued thereon July 22, 1881, and for such

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other relief as might be proper, upon the ground that the said judgment was irregularly and improperly entered, among other things in this—that the order of the court made December 17, 1880, on the conclusion of the trial at the circuit, stayed all proceedings upon the verdict, until this decision of the general term upon the exceptions taken by the defendant, claiming that the simple direction sending exceptions to the general term in first instances, operated under the Code of Civil Procedure (*sec.* 1000), as under the old Code (*sec.* 265), to stay all proceedings upon the verdict until the decision of the general term upon the exceptions.

The trial was concluded December 17, 1880, before justice BARKER and a jury. The following is an extract from stenographer's minutes.

The court said to the jury: "You are directed by the court to render a verdict of \$1,360.20 in favor of the plaintiff. I think those exceptions ought to be heard at general term in first instance.

"Mr. Moot (defendant's attorney)—Your honor will note an exception to your ruling, and your honor will give us sixty days stay of proceedings."

The entry in clerk's minutes was as follows:

"Defendant allowed sixty days to make and serve case and exceptions, with stay of proceedings in the meantime, and ordered that exceptions be heard at general term in first instance."

February 17, 1881, in default of defendant's so doing, plaintiff entered a formal order, dated December 17, 1880, which read as follows:

"On motion of defendant's attorneys, said defendant is hereby allowed sixty days from date of this order within which to make and serve case and exceptions, with a stay of proceedings in the meantime, until the expiration of said sixty days.

"And it is hereby ordered that the exceptions be heard at general term in the first instance."

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February 19, 1881, plaintiff entered judgment upon her verdict. The exceptions were argued at the general term in June 1881, and decision thereon reserved.

Plaintiff issued execution upon her judgment July 22, 1881, and a levy was made thereunder.

Notice of this motion was served July 24, 1881, and the same was heard upon affidavits.

Adelbert Moot, for motion.

John Campbell Hubbell, for plaintiff, opposed, argued that under the old Code, when the exceptions and motion for new trial thereon were sent to the general term, it was provided that the "exceptions must be there heard in the first instance, and judgment there given" (*Sec. 265, old Code*). And this disposition of the exceptions, of course, effected a suspension of judgment and a stay (judgment could only be granted under such statute by the general term), regardless of whatever loss and suffering it might entail upon the successful party, for the justice had no discretion, but a stay was thereby arbitrarily had. The provisions of the Code of Civil Procedure (*secs. 1000 and 1005*) have effected a much needed and most salutary change in the old practice, vesting in the trial justice an extended discretion in the sending of exceptions to general term, &c., not requiring that the judgment should be there given, but authorizing the entry of judgment upon the verdict, unless the trial judge directs that judgment upon the verdict be suspended until the decision of the general term granting or refusing a new trial (the order herein does not contain any such provision), when, in case such motion be denied, judgment may be entered then upon the verdict, if it had been suspended. And section 1000 (*id.*) also required the entry of a formal order embodying the direction of the court (*Sec. 1000, id.*). Any claim that sending exceptions to general term in first instance, for motion for a new trial thereon, effects a stay of proceedings *ipso facto*, is effectually disposed

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of by the further recent provisions of the new Code (*Sec. 1005, Code of Civil Procedure*). "The entry of final judgment, and the subsequent proceedings to collect or enforce it, are not stayed by an exception or * * * motion for a new trial, unless an order for such a stay is procured and served" (no exception is made on behalf of motion for new trial on exceptions at general term). "And the entry, collection, &c., of a judgment does not prejudice a motion for a new trial. When a new trial is granted, the court may direct and enforce restitution as when a judgment is reversed upon appeal." All of which goes to show that there cannot be a stay or suspension of judgment unless so ordered. Independent of the sending exceptions to general term for motion for new trial thereon, this section in effect says that that does not of itself suspend judgment, &c. It is not stayed thereby, "unless an order for such a stay is procured and served" (*Sec. 1005, id.*). It also so indicates by providing for restitution, after collection of judgment, in case a new trial should be granted. It seems as if it were intended to temper justice and favor to the defeated party, with mercy, justice and security to the victor, by sending exceptions to be disposed of quickly, and to secure the fruits of his victory to the successful party in case his judgment be sustained. Unlike the old Code, in its phraseology, substance and purpose, it lets the exceptions go to general term, and yet does not work a stay unless so especially ordered. It vests power in the court to do perfect justice in disposing of the motion for a new trial, and yet allowing the entry of judgment upon conditions, or compelling defeated party to give security to avoid entry thereof, in other words, it authorizes an exercise of discretion, upon such facts as the particular case may disclose, in preservation of the rights of all parties. The hardship of the former practice to the successful party, and the effect it had often in defeating him upon his execution, called for the unfavorable comment of the courts upon so hard and unbending a rule, and resulted, as we submit, in the new statutory provisions under discussion.

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It seems to us that it is "the other things" besides the entry of formal order referred to by TALCOTT, J., in *Cole* agt. *Webster* (17 *Hun*, 507). It cannot be anything else. If the new Code was not intended to change the old harsh practice, why the change in the phraseology and restraint of its provisions? That this is a very important point of practice arising under the new Code not yet adjudicated upon, and that the views here presented are concurred in by some of the ablest lawyers at this bar, must be my apology for presenting and further urging these considerations upon the court. Of course, the direction of the court and not its intention must govern. It is easy to see how a party entitled to a stay could secure the order of the court therefor. In any event, it is hard for us to see why, in case of a result unfavorable to plaintiff upon this motion, she should be charged with costs for following the stenographer's minutes, those of the clerk, the directions of the court (as she understood them), and the order as entered.

BARKER, J. — The defendant's motion is granted, without costs, and the order entered by the clerk is to be amended so that it will in terms provide for a stay until decision of exceptions at general term.

There can be no fair doubt but that the defendant's attorneys understood that the effect of the order was to stay all proceedings upon the verdict until the exceptions were heard and decided.

It was intended by the court that judgment be suspended, and I am unwilling that such intention be frustrated by an erroneous entry of the order by the clerk.

Mr. Hubbell should not have entered a formal order in the form which he did, reciting that it was done on the motion of the defendant's attorneys. That action was an interference, and the terms of the order is not in strict conformity to entry in clerk's minutes. But Mr. Moot seemed to have

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acquiesced in the act done by Mr. Hubbell, in his name, which mitigates this feature of irregularity.

I am inclined to the opinion that an order sending the exceptions to the general term, there to be heard in the first instance, does not suspend the entry of judgment unless the order as entered also provides for the suspension of judgment upon the verdict. Section 1000 (*Code of Civil Procedure*) is in the article entitled "Exceptions, Case and Motion for a New Trial."

The motion to be made in the general term is for a new trial on the exceptions, and all that court has power to do is to grant or refuse the motion.

If the opposing affidavits had contained facts showing the judgment could not be collected, if the motion for a new trial is denied, I should have sought to make an order retaining the lien now secured by the entry of judgment, but it would be contrary to the express understanding on the trial to allow this verdict to be collected before the decision of the general term. It was the very object and purpose of the order to have the law of the case settled before further proceedings on the verdict were had.

SUPREME COURT.

In the Matter of OWEN COUGHLIN.

Criminal law — Assault and battery — Power of the recorder of the city of Cohoes as to punishment of the offense — Chapter 456 of the Laws of 1880, amending chapter 440 of the Laws of 1876.

The prisoner is detained under a commitment signed "Charles F. Doyle, recorder of the city of Cohoes," which recites that "at a court of special sessions" held the 22d day of April, 1881, by him as recorder of the city of Cohoes, the said Coughlin was duly convicted of having unlawfully assaulted and beaten one John Murphy of said city of Cohoes on the 17th day of April, 1881, on which conviction it was adjudged that Coughlin should be imprisoned in the Albany Penitentiary at hard labor for the term of one year, and that he should also pay

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a fine of \$250, in default of which he should be further imprisoned one day for every dollar of such fine which was not paid:

Held, that under chapter 456 of the Laws of 1880, which amends chapter 440 of the Laws of 1876, the sentence was not in excess of the power of the recorder to impose (*See, also, In the Matter of Bayard*, 61 *How*, 294, the decision in which is held to be correct, and to be also sustained by section 1 of article 14 of the Constitution of the U. S.)

Ulster Special Term, August, 1881.

APPLICATION by *habeas corpus* to relieve the petitioner, Owen Coughlin, from confinement in the Albany Penitentiary.

Peter D. Niver and *Arthur E. Valois*, for prisoner.

D. Cady Herrick, district attorney, for people.

WESTBROOK, J. — The return of the warden of the Albany Penitentiary to the writ of *habeas corpus* served upon him shows that Owen Coughlin is detained by him as a prisoner under a commitment signed “Charles F. Doyle, recorder of the city of Cohoes,” which recites that “at a court of special sessions” held the 22d day of April, 1881, by him as recorder of the city of Cohoes, the said Coughlin was duly convicted of having unlawfully assaulted and beaten one John Murphy of said city of Cohoes on the 17th day of April, 1881, on which conviction it was adjudged that Coughlin should be imprisoned in the Albany Penitentiary at hard labor for the term of one year, and that he should also pay a fine of \$250, in default of which he should be further imprisoned one day for every dollar of such fine which was not paid.

It is claimed in behalf of the prisoner that the sentence was in excess of the power of the recorder to impose. Is the point well taken?

Chapter 456 of the Laws of 1880, which amends chapter 440 of the Laws of 1876, gives to the recorder of the city of Cohoes “jurisdiction to hear, try and determine in the first instance all charges for crimes and offenses enumerated in section first, article first, title third, chapter second of the fourth part of the Revised Statutes” (title third of the Revised

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Statutes referred to is entitled "Of Trials of Offenses before Courts of Special Sessions of the Peace"); "and, also, all complaints and charges against any person for the commission of any of the acts and offenses designated in the first section of title fifth of chapter twentieth of the first part of the Revised Statutes, and the acts amendatory thereof" (title five of the chapter and part of the Revised Statutes referred to is entitled "Of Disorderly Persons"); and, also, all offenses triable by courts of special sessions in towns and in cities of this state." The recorder is also given power to try sundry other specific offenses, which need not be stated here as the present case is covered by the provisions which have been mentioned.

The act to which reference has been made, after conferring upon the recorder jurisdiction to hear and determine the cases specified, declares that upon conviction of the offender the recorder shall "have power to punish by a fine not exceeding two hundred and fifty dollars, or by imprisonment in the Albany Penitentiary at hard labor for a term not exceeding one year, or by both such fine and imprisonment."

In the case of *Isadore Bayard* (61 *Howard*, 294), who was convicted by the Cohoes recorder of the crime of petit larceny and sentenced to the Albany Penitentiary for the term of nine months, it was held that such sentence was in excess of his power to impose. The reasons for such decision were predicated upon the fact that the general law of the state defined the crime of petit larceny and limited the term of imprisonment upon conviction to six months. The Cohoes act, which assumes to confer upon the recorder of the city the power to imprison for the term of one year for the same offense, was therefore held to be unconstitutional, because, first, it was contrary to the spirit of the constitution of our state, in that it gave to a local and inferior court greater power than could be exercised by superior courts of general jurisdiction; that it made the gravity of the penalty for crime depend upon the spot of its perpetration and not upon the degree of criminality of the act, and that it destroyed the

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equality of citizens before and under the laws; and also because, second, it violated the provision of the state constitution prohibiting the infliction of "cruel and unusual punishments" by permitting a local and inferior court to impose a penalty double in severity to that which the legislature had, by a general law applicable to the entire state, declared to be an adequate and sufficient punishment for the same offense. To the arguments advanced to sustain the conclusion in the *Bayard case*, to the opinion in which reference is now made, can be added another founded upon section 1 of article 14 of the Constitution of the United States prohibiting a state from denying "to any person within its jurisdiction the equal protection of the laws." It is true that the origin of this constitutional provision is to be found in the thirteenth article of our federal constitution which abolishes slavery; but its language, whilst potent to protect in their rights of person and property all its citizens without regard to their previous condition, goes further and secures, and was designed to secure, to "any person" and to all persons "the equal protection of the laws." The Cohoes statute was condemned, among other reasons, for a violation of this very principle, though such principle was not then referred to as one declared in and by the constitution of our union as states, but only as one existing by natural right and recognized in the spirit of both federal and state constitutions. Words would be wasted in the attempt to prove that a law which draws around the city of Cohoes a line separating it from all other portions of the state, and marking its inhabitants as persons so morally bad that punishments, in severity double to those which can be inflicted elsewhere within our commonwealth, are there needed to preserve the public peace and the observance of law, does not afford to all persons within the state "the equal protection of the laws." It is true that the Cohoes charter subjects all persons who may offend against the law within the city limits to the same penalty, whether residents or non-residents, but as its residents must be the principal sufferers from the harshness of its provisions, it fol-

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lows that they are deprived of "the equal protection of the laws;" and because it is a constitutional impossibility to find any spot in the state in which its general public law ceases to operate, it must be equally impossible to discover within its borders a place where, if the general law of the state be infringed upon, the offender has forfeited the protection which such general law affords. In short, both an express constitutional enactment and an inherent principle of our government demand that a law which professes to cover the entire state shall operate equally, that no local statute shall give to the lawless offender against public and private rights exemption from punishment by reason of the locality of the offense, nor subject him for an act therein committed to penalties and punishments greater than those elsewhere inflicted for the same offense; and a local statute which assumes to prevent the operation of the criminal laws of the state in a district thereof, or undertakes to enforce them by penalties greater than those elsewhere imposed within the same commonwealth, is an attempt, as to the offended in the one instance, and the offender in the other, to deprive a person of "the equal protection of the laws." The constitutional guaranty, and the great fundamental axiom of the law, that statutes must operate equally, protect the person and property of the citizen against the wickedness of the depraved, and protect even the criminal, who also has rights which must be respected, from the vengeance of an enactment which deprives him of immunity from punishment beyond and in excess of that prescribed by the general law, and dooms him to penalties and punishments of double severity.

The soundness of the decision, then, in the *Bayard* case is maintained, but its applicability to the present case is denied. The general law of the state does not limit the punishment for assault and battery to six months' confinement and a fine of fifty dollars. The provision referred to by the counsel for the prisoner (3 *R. S.* [6th ed.], 1007, sec. 19) is only a limitation upon the power of a court of special sessions to punish.

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A simple assault and battery is a misdemeanor, and punishable "by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment" (2 *Ed. Stat.*, 719, *sec.* 40). Possibly, by the act of 1879 (*chap.* 390; *see, also, Ryan agt. The People*, 79 *N. Y.*, 593), which gives to courts of special sessions, "except in the city of Albany and in the city and county of New York * * * exclusive jurisdiction in the first instance to hear and determine * * * charges for assault and battery not alleged to have been committed riotously," there is a practical difficulty in punishing the offense in the greater part of the state by penalties more severe than those allowed to be imposed by courts of special sessions, but when the power was conferred upon the recorder of the city of Cohoes, as it was in 1876 (*chap.* 440 of the *Laws of 1876*), to punish by imprisonment for a year, and a fine of \$250, there was no limitation to a six months' imprisonment and a fine of \$250, except in and to courts of special sessions. The Cohoes act of 1876 was re-enacted in 1880 with a slight change, so that it is clear that the recorder has only exercised in this case the power of punishment conferred expressly upon him, and which was and is no greater than that prescribed by the general law of the state.

It is, however, also insisted that section 2 of the act of 1880, amending section 30 of the act of 1876, which provides, "When any person charged with any crime or offense specified in the preceding sections, or of any crime or offense of the grade of misdemeanor (except cases of felony and misdemeanors, when the punishment can exceed a fine of \$250 or one year's imprisonment either in county jail or penitentiary) shall be brought before such recorder, it shall be his duty forthwith to hear and determine such complaint, and charge against such person according to the provisions of said article first, title third, chapter second of part fourth of the Revised Statutes," limits the punishment to that which the special sessions is authorized to inflict. This point must also be over-

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ruled. The power to punish by a year's imprisonment and a fine of \$250 is expressly conferred by the previous section, and the provision, which has just been quoted, refers simply to the mode and manner of the trial.

It is further claimed in behalf of the prisoner that as the warrant of commitment recites that he was convicted "at a court of special sessions," the power of punishment is only that of a court of special sessions. The answer to this argument is, that the recital in the warrant is erroneous, and such erroneous recital does not deprive the recorder of the authority conferred upon him. The court before which the prisoner was tried and convicted was not simply a court of special sessions. It was a recorder's court, and as such was clothed with the jurisdiction conferred by law.

For the reasons given, the writ of *habeas corpus* must be dismissed, and the prisoner remanded to the custody of the warden of the penitentiary.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of OTTO SCHALLER to EDGAR POOL, dated October 21, 1879, and the claims of MILO W. PEMBER, a creditor, against the assigned estate.

General assignment act — Preferred claims — General release — Judgments obtained after assignment — Report of referee under order to take testimony and report — Irregularities in proceedings of assignee in reference to accounting — Affidavit of service of the notice to creditors to produce their claims before the assignee — Rules of common pleas respecting such service — Authority of referee on reference to take and state an account — Service by mail of citations — Authority of court as to service — Rights of creditors to notice and hearing on application for reference — Costs and disbursements allowable under assignment act and Code of Civil Procedure, section 3240.

Where S. made an assignment to P. for the benefit of creditors, and one of the creditors, who was both a preferred and general creditor, signed, under mistake, a general release to both assignor and assignee, suppos-

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ing it to be simply an agreement that the assignee be allowed to deliver to the assignor goods belonging to the assigned estate, so as to promote a composition or compromise between the creditors and the assignor, and the assignee objects to the claims of such creditor, because of such release, and refuses to allow the claims on that ground and also on the further ground that the said creditor had received promissory notes of the assignor on the execution of said release, which notes were dated subsequent to the assignment, and the release also recited another note representing the preferred portion of the creditor's claim, but made and dated prior to the assignment; and the creditor obtained judgments on all the notes while the assignment was being executed, but was paid no money on account of either the notes or the judgments. The creditor meantime also procuring a judgment in a court of equity setting aside the said release as against the assignor on the ground of mistake, but not making the assignee a party to such equitable suit, and there being no evidence that the assignee was privy to the making of the release, but some evidence to the contrary:

Held, on motion of the creditor to confirm the report of a referee reporting in favor of allowing the claims of such creditor as good and valid claims, and that they have been established and should be paid out of the assigned estate. "The referee's report as to the claims of such creditor seems entirely correct and should be confirmed."

So, where, on a motion by assignee to confirm, in whole or in part, a report by the same referee appointed to take and state the assignee's accounts, there is an absence of proof of service of notice to creditors to produce their claims before the assignee, as prescribed by the rules of this court, and, secondly, where it appears affirmatively that the citation was not served upon certain creditors who had filed claims with the assignee:

Held, that the order of reference to take and state the accounts was entirely irregular and conferred no authority upon the referee; that the referee cannot cure this irregularity nor usurp the powers of the court. These creditors had the right to be heard upon the application for a reference, and neither the assignee nor any other person or court can deprive them of that right.

Held, also, where it further appears from the papers submitted that the citation was served upon the creditors whom the assignee claims to have served by mail, and it does not appear that there was any authorization by the court that the service should be made in that way, that the report cannot be confirmed.

Where, in a proceeding under the general assignment act by a creditor to establish claims as a general and preferred creditor, which have been disallowed by the assignee, the creditor prevails on a reference, the referee reporting to the court that the claims are valid claims and established,

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and that they should be paid by the assignee out of the assigned estate, and the court at special term, on motion, confirms such report of the referee, with costs and disbursements :

Held, "the same costs and disbursements are allowed as to a successful plaintiff in an action, by the Code of Procedure, with five per cent allowance upon the amount reported due, with ten dollars costs of motion to be paid by the assignee out of the assigned estate."

Special Term, August, 1881.

Before CHARLES H. VAN BRUNT, *Ch. J.*

MOTIONS to confirm two reports by the same referee.

First. As to the first motion—a motion to confirm the report of George B. Pentz, Esq., a referee appointed by an order of court to take the testimony respecting the disputed claims of Milo W. Pember and the issues raised by the petition, and to report his opinion thereon. A reference respecting the same claims had previously been made to the same referee on motion of assignee's attorneys, and the reference had been terminated by them after the testimony had all been taken, by reason of the illness of the referee, who inadvertently allowed the statutory time within which to file a report to expire. The first order of reference respecting the Pember claims was to hear and determine. The second order of reference provided that all the testimony on the former reference be used on the new reference. The referee made and filed his report under the second order in favor of the claim of Milo W. Pember, as established, to be a good and valid claim, and that it should be paid out of the assigned estate by the assignee. The testimony showed that the claim was originally for goods sold and delivered, namely, cassimeres and woolen goods, Mr. Pember, the creditor, being a wholesale dealer in such goods in the state of Connecticut, and Mr. Schaller, the assignor, being a jobber in the same class of goods and doing business in the city of New York; that after the sale and delivery of the goods, promissory notes were given by Schaller to Pember, and the notes renewed and changed, as to time

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and amounts, to suit the convenience of the parties, and conform to payments and other allowances agreed upon by the parties. The goods were sold in 1878 and the assignment made in 1879, October 21. The assignment and schedules recognize all the claims now made by Pember and even more. The preferred portion of the claim is \$347.42; besides this, there are sundry other claims not preferred, making in all upwards of \$1,300. After the assignment was made, and in November, 1879, following, Otto Schaller, the assignor, entered into negotiations with his creditors to compromise. Edgar Pool, the assignee, would, as Schaller represented to creditor Pember, surrender to him, Schaller, all the goods of which Pool had taken possession under the assignment, if the creditors would release him, Pool, from any and all liability in the matter. Creditor Pember, therefore, undertook, as he supposed, to make such a release and deliver it to Schaller. The consideration of the release was, as it recites, several notes, one being dated September 15, 1879, and the identical note or claim preferred in the assignment in favor of creditor Pember. Other notes were also recited in the release as a part of the consideration, and a part of them dated subsequently to the assignment. The proposed compromise was never consummated and the notes were never paid. The notes represented, or were intended to represent the real indebtedness of Schaller to Pember. After the notes had become due two actions were brought in the marine court for the goods represented by the notes. Judgments were finally obtained in these marine court actions, but on amended complaint setting forth the notes. Thereafter, Edgar Pool, the assignee, heard of the release through some third party, a creditor named John S. Hulin, and that it was a general release. He thereupon gave notice to creditor Pember that the claims were disallowed by reason of this alleged general release. Hence the reference ordered as above to determine the question of the so-called release. Pending the reference to inquire into this release, creditor

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Pember learned that the paper he signed was, in form, a general release. He commenced an action in the supreme court to cancel it and prevailed. The referee admitted evidence of those facts and of the judgment cancelling the release; he also admitted in evidence the judgment-roll in that action and also the judgment-rolls of the marine court. The report of the referee, which was in favor of the Pember claims, was presented for confirmation on this motion, and the main questions raised in opposition to its confirmation were as to the effect of the release and the judgments on the notes.

Chauncey B. Ripley and *Samuel Jones*, on behalf of creditor Milo W. Pember, made and argued the points following :

I. Independently of the findings of the referee, the assignee must pay the preferred claim of creditor Pember simply because the assignment so directs in express terms. This court has held in two cases, and the same doctrine is held by the court of appeals, that "the authority of the assignee and the control of the court over him are limited by the terms of the assignment; that the court, therefore, has no power to direct otherwise than the assignment prescribes respecting a preferred claim and cannot compel a violation of the terms of the assignment after it has taken effect" unless pursuant to a decree in an equity suit brought for the purpose of setting aside the assignment wherein all the creditors are made parties (*In re Assignment of John D. Cordes*, *Daily Register*, October 16, 1880, *per VAN BRUNT, J.*; *In re Ward & Pcloubet's Assignment*, *opinion of VAN HOESEN, J.*, filed August 4, 1880; *In re Assignment of John W. Lewis*, 81 *N. Y.*, 421).

II. The assignee has made out no case for rejecting any of the Pember claims, and the referee could not have found otherwise than that they were valid claims and that they should be paid. The only objection to the Pember claims which the assignee ever suggested is that he was informed

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that Pember had executed a release of the claims; but the assignee offered no evidence against the validity of the claims, except a so-called general release together with the facts that it was signed by Pember and delivered to Schaller, while creditor Pember proved by his own testimony, by the testimony of the assignor, Schaller, and also by Mr. Zerwick, who was the subscribing witness to the so-called release, that the instrument was without consideration, that it was intended for no such purpose as a release of any of the claims referred to, and that it was signed with reference to some transaction that never was consummated and as recited in the complaint in the supreme court action which was brought to set aside the release as mentioned below. The testimony also shows that Pool was never a party to the instrument, and did not in any way participate in the transaction. Besides it was in evidence before the referee that this release had been declared void and set aside by our supreme court in an action brought for that purpose. The assignee's counsel was cognizant of such action at the time it was brought, and the reference was adjourned for that purpose and until judgment was obtained. It was also in evidence that in certain actions brought by Pember against Schaller in the marine court of the city of New York the said release was set up by Schaller as a defense to the said claims, and that judgments on all the claims were awarded to said Pember as plaintiff in those actions.

III. None of the so-called exceptions to the report of the referee in the Pember claims are available to the assignee, and for the reasons specified as to each exception. The referee's report was as full as is required in any case unless findings be specially requested. The referee was not required under the order appointing him to do more than report his opinion to the court, and that he did. His report states in general terms what the judgment or final order in the matter should be. Besides there was no request made by assignee's counsel to find any fact specifically. In order to render the proposed exceptions available at any time or for any purpose

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the propositions embraced in them should have been submitted to the referee before he filed his report with a specific request that they be found by the referee as independent facts, that would have put the assignee's counsel in a position to file exceptions if the facts were not correctly found. But nothing else would secure the right to exceptions. How can it now be objected that there was no such specific findings when there was no request, and when it was not known to the referee that such specific findings were desired? The referee has found, as any judge has a right to find, in general terms for one of the parties. In so doing he is presumed to have found everything essential to support such general finding, including all the details, and the finding is properly expressed in the general language employed. Any judge or court may express that which is to form the basis of a judgment in a general way, and need not, in a case like the present, unless specially requested by counsel beforehand, find any question of fact or law in detail (*People* agt. *The Albany and Susquehanna R. R. Co.*, 57 *Barb.*, 204, 210, and note [b] of *N. C. Moak, Esq.*; *Code Civil Pro.*, sec. 1023; *Stewart* agt. *Morss*, 79 *N. Y.*, 629).

IV. Privity could not be created between Pool and Pember respecting the so-called release under the rule in *Lawrence* agt. *Fox* (20 *N. Y.*, 268) and kindred cases, because Pool was not a "party intended to be benefited;" and there was no "obligation or duty owing" by Pember to Pool (*Vropman* agt. *Turner*, 69 *N. Y.*, 280, 284, *per ALLEN, J.*).

V. Costs should be allowed creditor Pember, of course (*Moving Aff.*; *First Nat. Bk.*, &c., agt. *Tamajo*, 77 *N. Y.*, 476; *Cornelius* agt. *Barton*, *N. Y. Weekly Dig.*, June 10 and 17, 1881, pp. 216, 217).

VI. The referee's report should be confirmed.

Thomas F. Wentworth (*Foster, Wentworth & Foster, Attorneys*), for Edgar Pool, assignee.

I. The release, exhibit A, operated as an extinguishment

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of the Pember claims (*Hosack* agt. *Rogers*, 8 *Paige Ch. R.*, 229).

II. The marine court judgments obtained by Pember on the notes operated as an estoppel.

III. Two of the notes were dated after the assignment, and are new and independent obligations.

IV. The defense of the supreme court judgment is not available, because Pool was not made a party.

V. The release is the assignee's voucher for the execution of his trust respecting the Pember claims.

VI. Pember should not have costs as to the supreme court judgment; because it is a defense occurring subsequently to the assignee's petition.

VII. The report should not be confirmed.

Second, As to the second motion—a motion to confirm the report of the same referee appointed to take and state the account. This was a motion made by assignee's attorneys, bringing up the report to take and state the accounts for confirmation or otherwise. It was opposed on various grounds, mainly on the ground that the attorneys for assignee had put in excessive charges for professional services rendered to Pool, assignee, specifying a bill for bookkeeping by a former employe of assignee, and fees and expenses for collecting small sums; and especially charges for contesting the Pember claims.

For the motion, *Thomas F. Wentworth* (*Foster, Wentworth & Foster, Attorneys*) urged that the report should be confirmed, except so far as it recognized the Pember claims as valid claims.

In opposition, for Reynolds, a creditor, *George W. Gallinger*.

The charges of the assignee's counsel are excessive, being twenty-five per cent of the entire fund.

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George B. Ashley appeared for John S. Hulin, and *Chauncey B. Ripley*, for creditor Pember.

VAN BRUNT, J. — The irregularity in the proceedings of the assignee in reference to the accounting makes it impossible to confirm the referee's report.

There is no affidavit of service of the notice to creditors to produce their claims before the assignee, as prescribed by the rules of this court.

Secondly. It appears affirmatively that the citation was not served upon certain creditors who had filed claims with the assignee. It is true that the referee upon the reference has endeavored to cure this irregularity, but I find no authority in the statute authorizing the referee to usurp the powers of the court. These creditors had the right to be heard upon the application for a reference, and neither the assignee or any other person or court can deprive them of that right. It would seem, therefore, that the order of reference to take and state the accounts was entirely irregular and conferred no authority upon the referee.

It further appears from the papers which have been submitted that the citation was served upon the creditors whom the assignee claims to have served by mail, and it does not appear that there was any authorization by the court that the service should be made in that way.

The referee's report as to the claim of Milo W. Pember seems to me entirely correct and should be confirmed. For these reasons the referee's report cannot be confirmed, and for these, if for no other.

NOTE. — Application having been made by creditor Pember's counsel for the settlement and entry of an order pursuant to the opinion above, points were submitted on the question of costs as follows:

Chauncey B. Ripley, for creditor.

I. Costs should be allowed creditor Pember of course, and a reasonable counsel fee (*General Assignment Act, 1877, pamphlet with notes by Bishop, 23, sec. 26*).

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II. The costs asked are ordinary costs, viz.: Forty dollars, *i. e.*, twenty-five dollars before and fifteen dollars after notice, the same allowed for similar service in an action (*Code Civ. Pro.*, sec. 3240).

III. The disbursements have been proved by affidavit of creditor Pember's attorney.

IV. The allowance of \$150 is reasonable for thirty sittings. Counsel for the assignee asks for an allowance of \$250 in this very matter for his extra costs; it does not therefore lie in the mouth of assignee's counsel to say that \$150 is too much for his adversary, or \$125 too much for the referee. The referee's fees, \$125, should be allowed because it has been paid as a necessary disbursement; besides, the parties stipulated not to oppose the amount; the amount is reasonable for work done; there having been between thirty and forty sittings.

V. The authorities sustain such charge: Where "the court referred the matter back to the same referee, directing him to report the evidence taken upon the first reference," it is the same as if the testimony had been taken in the second reference (*Roberts* agt. *White*, 73 N. Y., 375). The referee does not forfeit his fees where he comes within the spirit of the statute or where the parties waive a technical irregularity (*Cornelius* agt. *Barton*, N. Y. *Week. Dig.*, June 10 and June 17, 1881, pp. 216, 217; *First Nat. Bank* agt. *Tamajo*, 77 N. Y., 476; *Geib* agt. *Topping*, 11 *Week. Dig.*, 172; *Waters* agt. *Shepherd*, 14 *Hun*, 223). See, also, order VAN HOESEN, J., herein, *In re Ashley's* costs, in which judge VAN HOESEN expressly grants leave to Mr. Ashley to apply for costs.

VI. The special term decision of judge JOSEPH F. DALY (*Matter of Currier*, 8 *Daly*, 122), where the question arose on an application to take and state an account, is not necessarily in conflict with this application, for reasons: (1.) There the reference was not of the kind referred to in section 26 of the general assignment act; that is a disputed claim to which the power to award costs is limited (*Matter of Currier*, 8 *Daly*, 122). (2.) That case certainly holds that the creditor should be indemnified (*Id.*, 123). (3.) And in this case the costs will, as a matter of fact, come out of John S. Hulin, who is the only other preferred creditor, and he is entitled to the entire fund; Hulin is the same person at whose request the matter was referred. (4.) If not payable out of the estate, the costs certainly should be paid by Hulin or the assignee personally (8 *Daly*, 123).

Thomas F. Wentworth, for assignee, made and submitted the following:

I. The only proper order herein to be entered under the decision and proceedings is one confirming the referee's report.

II. The order of reference herein was made not to hear and determine, but simply to inform the mind of the court by taking the testimony and reporting the same with referee's opinion. It was not a special proceed-

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ing as no issues were referred, but simply a reference to take testimony and return the same for the use of the court.

III. The court could, under section 26 of the assignment act, order a reference of the issues either before a jury or a referee, and in this case the judgment of the referee would be final and the proceeding before him a trial entitling the prevailing party to costs, and the original order in this matter "*to hear and determine*" was annulled, and the present order entered in its stead simply to report to the court for the latter's information. It was not a litigation in a court of justice. The proceeding herein is a motion determined by the court on papers submitted.

IV. Under the twenty-sixth section, costs and counsel fees are discretionary. There are four excellent reasons why they should not be allowed: 1st. When the assignee commenced this proceeding the release stood as a valid release of those claims. 2d. Two of the notes proven against the estate and rejected by the assignee, were made twenty-six days after the assignment, and it was not until this proceeding was inaugurated and during its progress, and by means of its record, that Pember changed the character of his claim against the estate from one on these two promissory notes to one for goods sold and delivered, and this too when, 3d, he had already taken judgment in the marine court on those two notes two months before the assignee made this motion, and thus giving presumptive notice at least that he did not propose two months after the judgment in marine court to turn around a third time and conclude to collect his claim as for goods sold and delivered.

V. The assignee should not be charged with Pember's laches who neglects to set his release aside until after the motion in this matter, and then too without any notice to assignee.

When I read over the above, on *second thought*, it seems that Pember had no claim when this motion was made, and that he has done only what he was obliged to do, namely, come in and establish his claims, and he does so, if I understand the view probably taken by the special term, by proceedings since the assignee's motion. Why should the estate pay Pember for doing that without which he never could have had a claim against it? It is equivalent to being compelled to board a man for nothing, and also to pay him for his company in addition. I don't think he ought to have a penny for establishing his claim (disbursements or costs).

Whereupon judge VAN BRUNT directed the entry of an order as follows:

Ordered, that the referee's report as to the claim of Milo W. Pember be and the same is hereby confirmed in all respects, and the said motion granted with the same costs and disbursements as are allowed to a successful plaintiff in an action by the Code of Procedure, with five per cent allowance upon the amount reported due said Pember; said costs and disbursements to be taxed by the clerk upon two days' notice to assignee, and with ten dollars costs of this motion to be paid by the assignee out of the assigned estate to the attorney for said Milo W. Pember, creditor.

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And the costs were thereupon taxed and readjusted, on notice, as follows: Costs before notice of trial, twenty-five dollars; costs after notice of trial, fifteen dollars; trial fee, issue of fact, thirty dollars; allowance by court, five per cent on \$1,227.38, amount allowed with interest, sixty-one dollars and thirty-six cents; motion costs allowed by court, ten dollars; trial occupied more than two days, ten dollars.

The disbursements were as follows: Referee's fees paid G. B. Pentz, \$125; clerk's fees on entering judgment, fifty cents; affidavits and acknowledgments, ten, one dollar and twenty-five cents; satisfaction piece, thirty-eight cents; transcript and filing, eighteen cents; certified copies judgments, twenty-nine dollars and sixty-three cents; certified copies, orders, six, sixty cents; postage, sixty cents; stenographer's fees, nine dollars and fifty-cents; sheriff's fees on execution, seventy-two cents; attendance of following witness, G. Zerwick, two days, one dollar; total amount of costs and disbursements, \$320.72.

COURT OF APPEALS.

THE PEOPLE *ex rel.* CHARLES ROSENKRANS, respondent, agt.
JOSEPH B. CARR, secretary of state, appellant.

Surrogate of the city of New York — His term of office.

The act of 1869 (*Laws of 1869, chap. 282*), which provides that "the term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York, shall be six years," *does not repeal* the third section of the act of 1847 (*Laws of 1847, chap. 488*), which provides that "in case a vacancy shall occur in either of said offices" (recorder or surrogate of the city and county of New York) "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had so become vacant."

The provisions of section 15 of article 6 of the constitution, as amended in 1869 with reference to county judges and surrogates in counties having a population of over 40,000, do not refer or apply to the city and county of New York. This provision applies only to the counties (other than the city and county of New York) wherein there are courts known as the county court, and judges known as the county judge, and the office of surrogate of the city and county of New York is not held

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under section 15 of article 6, but is a local office established especially for that city, under pre-existing laws, and recognized and continued by section 12 of article 14 of the constitution, and the term of that office is left wholly under the control of the legislature.

Where C., the present incumbent of the office of surrogate of the city and county of New York, was appointed on the 12th day of April, 1876, by the board of aldermen of New York, acting as supervisors to fill a vacancy occasioned by the death of V. S., whose term of office, had he lived, would have expired January 1, 1882, and at the general election held in November following the said C. was elected surrogate by the electors of the city and county of New York:

Held, that such election only entitled C. to hold the office for the unexpired term of V. S., deceased, and not for the full term of six years, and consequently his term of office would expire December 31, 1881 (*Affirming S. C., ante, 19*).

Decided October, 1881.

CHARLES ROSENKRANS, a taxpayer of New York city, sought, by application to justice WESTBROOK, to secure a *mandamus* to compel the secretary of state to give notice of the election of a surrogate in the county of New York, in place of the present incumbent, Delano C. Calvin, upon the allegation that his term of office will expire December 31, 1881. The application was denied, it being claimed that Mr. Calvin's term would not expire until 1882 (*See ante, 5*). The general term, first department, reversed justice WESTBROOK's order (*see ante, 19*) and from such reversal this appeal is taken.

James R. Lyddy, for respondent.

William B. Ruggles, deputy attorney-general, for appellant.

RAPALLO, J.—The office of surrogate of the city and county of New York existed long before the adoption of the constitution of 1846, and is recognized in the twelfth section of article 14 of that instrument, which provides that "all local courts established in any city or village, including the

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superior court, common pleas, sessions and surrogates' courts of the city and county of New York, shall remain, until otherwise directed by the legislature, with their present powers and jurisdiction." There is no limitation of the power of the legislature to fix or alter the term of office of the surrogate of the city and county of New York, as it may see fit. By the section last cited, it was provided that the judges of the courts therein named in office on the first of January, 1847, should continue in office until the expiration of their terms of office, or until the legislature should otherwise direct. By the amendments contained in article 6 (adopted in 1869), section 13, the terms of office of the judges of the superior and court of common pleas, to be thereafter elected, were fixed at fourteen years, but no provision was made in respect to the term of office of the surrogate. The provisions of section 15 of the same article, with reference to county judges and surrogates in counties having a population of over 40,000 do not, in our judgment, refer or apply to the city and county of New York. That section continues the then existing county courts, and declares their jurisdiction and the term of office and powers of the judge thereof, and provides that "the county judge shall also be surrogate of his county, but in counties having a population exceeding 40,000 the legislature may provide for the election of a separate officer whose term of office shall be the same as that of county judge." We think that this provision applies only to the counties (other than the city and county of New York) wherein there are courts known as the county court, and judges known as the county judge, and that the office of surrogate of the city and county of New York is not held under section 15 of article 6, but is a local office established especially for that city, under pre-existing laws, and recognized and continued by section 12 of article 14 of the constitution, and that the term of that office is left wholly under the control of the legislature. A reading of the entire section (fifteen of article six) in con-

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nection with section 16 of the same article confirms this interpretation.

This view disposes of the argument that the term for which the surrogate of the city and county of New York must be elected is fixed by the constitution at six years (which is the constitutional term of office of the county judge), and that the legislature has no power to fix a shorter term, even when the election is to fill a vacancy occasioned by the death of an incumbent before the expiration of his term.

The only question remaining to be considered is, whether the act of 1869 (*Laws of 1869, chap. 292*), which provides that "the term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York, shall be six years," repeals the third section of the act of 1847 (*Laws of 1847, chap. 488*), which provides that "in case a vacancy shall occur in either of said offices" (recorder or surrogate of the city and county of New York) "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had so become vacant."

It is not claimed that there is any express repeal of this section, but it is contended that the provision, that in case of a vacancy during a term an election shall be had to fill the unexpired term, is inconsistent with the provision of the act of 1869, that the term of office of whoever shall be thereafter elected surrogate shall be six years, and that by reason of this inconsistency the prior provision must be deemed repealed.

After a careful consideration of both acts we are of opinion that no such inconsistency appears. The first section of the act of 1847 provides for the election at the general election in November of a recorder and surrogate for the city and county of New York, "who shall hold their respective offices for the term of three years from the first day of January next after

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said election," and afterwards follows the third section, which provides that in case of a vacancy occurring during such term it shall be filled by election for the unexpired part of the term. There is no repugnancy or inconsistency in these two provisions, which are contained in the same act. The act of 1869 declares that as to persons thereafter elected the term of office shall be six years, and leaves the other provisions of the act of 1847 untouched. There is no more inconsistency between the provision which fixed the term of office and that which provides for filling a vacancy for an unexpired term, when contained in two acts, than when contained, as they originally were, in a single act. In substance the only effect of the act of 1869 was, in our judgment, to change the term of office from three years to six years, leaving in force all the other provisions of the act of 1847, which declare when the term shall begin, how, in a case of a vacancy, it shall be filled until the next election, and that when the election is had it shall be for the unexpired term of the preceding incumbent. In the absence of any reference, in the act of 1869, to those provisions, or of the substitution of any other on the same subjects, we are not authorized to infer that it was intended to repeal them. The language of the act of 1869, making it applicable to persons thereafter elected, was manifestly adapted for the purpose of excluding the idea that it was intended to extend the terms of those in office at the time of the passage of the act, a construction for which there might have been some color, if the act had simply declared that thereafter the term of office of recorder and surrogate should be six years, or if it had amended the act of 1847 by substituting the word "six" in place of "three." The repeal of an existing law cannot be implied from language so clearly satisfied by attributing to it a different purpose.

Our conclusion is that the order at the general term should be affirmed.

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ERIE COUNTY COURT.

CONRAD LENHARD agt. JOHN LYNCH.

Jurisdiction of county courts as affected by chapter 480, Laws of 1880 — Constitutional law.

Chapter 480 of the Laws of 1880, which purported to increase the jurisdiction of the county courts from *one to three thousand dollars*, is now of no force or effect, for two reasons:

First. Because it attempted to amend a law which had been already repealed in express terms.

Second. Because it is in conflict with that provision of the constitution, which, by necessary implication, limits the jurisdiction of the county courts in this class of actions to those cases "in which the damages claimed shall not exceed \$1,000" (*This is adverse to Sweet agt. Flannagan*, 61 *How.*, 327).

March, 1881.

MOTION for a new trial on the minutes.

L. Le Clear, for plaintiff and for motion.

Lewis & Rice, for defendant, opposed.

WM. W. HAMMOND, *County Judge*. — This action was brought to recover upon a contract for work, labor and services by plaintiff in teaching defendant the art of photographing on china, and for damages for defendant's refusal to furnish money and carry out his agreement to enter into partnership with plaintiff in carrying on said business; for all of which plaintiff demanded judgment against defendant in the sum of \$3,000.

Defendant's answer is a general denial and sets up a counterclaim or offset for money loaned by him to plaintiff, and for which three promissory notes were given to him by plaintiff for the sum of \$3,000.

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Upon trial the jury rendered a verdict in favor of defendant and against the plaintiff for over \$2,700, and this motion is made upon the minutes by plaintiff to set aside this verdict upon various grounds, but none of which I shall consider except the one as to the jurisdiction of the court, as it is my opinion that the motion would have to be denied were it not for this objection to the jurisdiction; and if I am correct in the view I have taken of this, and the conclusion I have arrived at in considering it, this ground of objection to the verdict is fatal.

This question of jurisdiction was not in any manner raised or mentioned upon the trial of this action, and has not been raised or passed upon in any manner in this state under the act conferring additional jurisdiction upon the county courts by chapter 480, Laws 1880, that I can find.

The constitution of 1846 (*art. 6, sec. 14*) provided: "The county courts shall have such jurisdiction in cases arising in justices courts and in special cases as the legislature may prescribe, but shall have no original civil jurisdiction except in such special cases." The old Code provided (*chap. 379, Laws 1848, as amended by chap. 438, Laws 1849*) that the county court has jurisdiction in civil actions "in which the relief demanded is the recovery of a sum of money not exceeding five hundred dollars," &c. This was the extent of the jurisdiction of the county courts in this respect up to the time of the amendment of the judiciary article of the constitution in 1870. Section 15 of the article as then amended provides as follows, which is now in force:

"The existing county courts are continued, and the judges thereof in office, at the adoption of this article, shall hold their offices until the expiration of their respective terms. Their successors shall be chosen by the electors of the counties for the term of six years. The county courts shall have the powers and jurisdiction they now possess until altered by the legislature. They shall also have original jurisdiction in all cases where the defendants reside in the county, and in

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which the damages claimed shall not exceed one thousand dollars, and also such appellate jurisdiction as shall be provided by law, subject, however, to such provision as shall be made by law for the removal of causes into the supreme court. They shall also have such other original jurisdiction as shall from time to time be conferred upon them by the legislature," &c. Chapter 467 of the Laws of 1870 was enacted at the first meeting of the legislature, after the adoption of the foregoing provision of the constitution, and provides that "the county courts, in addition to the powers they now possess, shall have jurisdiction in civil actions when the relief demanded is the recovery of a sum of money not exceeding one thousand dollars," &c.

Section 340 of the Code of Civil Procedure, which defines the jurisdiction of the county courts, provides therefor in accordance with the foregoing provisions of the constitution and took effect the 1st of September, 1877. Chapter 245 of the Laws of 1880 (the general repealing act passed May 10 1880) repealed the old Code of Procedure and all laws amending the same; also the above mentioned chapter 467 of the Laws of 1870 (which increased the jurisdiction from \$500 up to \$1,000), which said repealing act by its terms was to take effect the 1st of September, 1880. Chapter 480 of the Laws of 1880, passed May 28, 1880, provides as follows: "Section 1 of chapter 467 of the Laws of 1870, entitled 'An act in relation to county courts,' is hereby amended so as to read as follows: The county courts, in addition to the powers they now possess, shall have jurisdiction in civil actions when the relief demanded is the recovery of a sum of money not exceeding three thousand dollars, or the recovery," &c. This act by its terms was to take effect immediately, and says nothing of section 340 of the Code of Civil Procedure above alluded to which defines the jurisdiction of the county courts. Thus it will be seen that chapter 467, Laws of 1870, was expressly repealed by chapter 245, Laws of 1880, to take effect the 1st of September, 1880; and after the passage of this repealing act

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chapter 480 was passed, which amended the act thus expressly repealed (the amending act), to take effect immediately.

What is the effect of this amendment? It is a well-established rule in the construction or interpretation of statutes that if there is a disagreement between two statutes, such exposition should be made as that both may stand together, if possible (*McCarter agt. Orphan, &c.*, 9 *Cow.*, 437). Applying this rule, chapter 480 would take effect upon its passage, and would remain in effect so long as the chapter which it amended; and when the act thus amended ceased to exist, the amending act would also cease with it. It does not seem as though this could have been the intention of the legislature, still if this was not their intention, why did they not amend section 340 of the Code of Civil Procedure, which provided the same thing, and was not repealed, instead of amending an act which they had already repealed? Judging from these acts of the legislature and the language used by them, I am of the opinion that chapter 480 must be held to be of no force after the act which it amended ceased to exist.

But if it should be conceded that chapter 480, by implication, repealed the repealing act, and revived that part of chapter 467, Laws of 1870, which was thus amended, there still remains the very serious question as to whether chapter 480 is not in plain conflict with that provision of the constitution above quoted: "They shall also have original jurisdiction in all cases where the defendants reside in the county, *and in which the damages claimed shall not exceed one thousand dollars.*"

It seems to me that, by necessary implication, this must be held to be a limitation in the constitution, and to exclude the jurisdiction of the county courts in those cases in which the damages claimed shall exceed \$1,000. The clause following, after providing for appellate jurisdiction, &c.: "They shall also have such *other* original jurisdiction as shall from time to time be conferred upon them by the legislature," I think, refers to *new powers* and *other subjects* and *other matters than*

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those mentioned and specified, and cannot be held to give the legislature authority to increase the *amount* for which damages may be claimed, *that having been, in the preceding clause quoted, expressly provided for.*

From these considerations it will be seen that we reach the conclusion that chapter 480, which purported to increase the jurisdiction of the county courts from \$1,000 to \$3,000, is now of no force or effect for two reasons: First, because it attempted to amend a law which had been already repealed in express terms; and, second, because it is in conflict with that provision of the constitution which, by necessary implication, limits the jurisdiction of the county courts in this class of actions to those cases "in which the damages claimed shall not exceed one thousand dollars."

As to the effect of this conclusion upon this action, I think the general doctrine is correctly stated in *McIntyre* agt. *Carriern* (17 *Hun*, 64), where it is held that, in an action where both summons and complaint demand judgment for over \$1,000, the court gets no jurisdiction of the action, and cannot even grant an amendment reducing it to \$1,000, so as to thereby give the court jurisdiction (*See, also*, 13 *Barb.*, 330, and 6 *Hill*, 631). I think it must follow, if the court has no jurisdiction, that it cannot render any valid judgment in the action, and the whole proceedings must be dismissed.

For these reasons the motion to set aside the verdict is granted, and the entire proceedings dismissed, but without costs to either party as against the other in this court.

Matter of Trimble.

SUPREME COURT.

In the Matter of WILLIAM TRIMBLE.

Criminal law — Disorderly persons — Extent of the power of the recorder of the city of Cohoes to punish — Chapter 456 of the Laws of 1880, amending chapter 440 of the Laws of 1876.

The prisoner was convicted "with having, on the 17th day of April, 1881, at the city of Cohoes, in said" (Albany) "county, together with Edward Freely, been guilty of noisy, loud and tumultuous conduct, to the disturbance of the public peace and quiet and of the people, and of having used loud, abusive, vulgar and quarrelsome language, and was fighting and quarreling to the like disturbance of the public peace and of the people," and upon such conviction was sentenced to an imprisonment of 359 days:

Held, that by chapter 456 of the Laws of 1880, amending chapter 440 of the Laws of 1876, the recorder of the city of Cohoes had the power to condemn the prisoner to the terms of imprisonment to which he was sentenced.

The punishment of the offense of which the prisoner was convicted is not specially prescribed by the general law of the state. It is one against the public peace not amounting to a felony, and is, therefore, a misdemeanor at common law and by the Revised Statutes, and as no special punishment is provided, is punishable by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment (*See also Matter of Bayard*, 61 *How.*, 294, and *Matter of Owen Coughlin*, *ante*, 34).

Ulster Special Term, August, 1881.

APPLICATION by *habeas corpus* to relieve Trimble from imprisonment in the Albany penitentiary.

J. B. O'Malley, for prisoner.

J. H. Delehanty, assistant district-attorney, for people.

WESTBROOK, *J.*— The prisoner, William Trimble, was committed on the 23d day of April, 1881, to the Albany penitentiary for the period of 359 days by the recorder of the city of Cohoes.

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The warden of that institution, by return to the writ of *habeas corpus*, which has been issued in behalf of the prisoner, submits to the court the warrant under which the latter is held. From such warrant it appears that on said 23d day of April, 1881, the party imprisoned was convicted "with having on the 17th day of April, 1881, at the city of Cohoes in said" (Albany) "county, together with Edward Freely, been guilty of noisy, loud and tumultuous conduct, to the disturbance of the public peace and quiet and of the people, and of having used loud, abusive, vulgar and quarrelsome language, and was fighting and quarreling to the like disturbance of the public peace and of the people," and upon such conviction was sentenced to an imprisonment for the term before mentioned, 359 days.

The first question which the case presents is, had the recorder of the city of Cohoes power to condemn the prisoner to so long a term of imprisonment?

By section 1 of chapter 456 of the laws of 1880, which amends the charter of the city of Cohoes, the recorder of such city is clothed with "authority and jurisdiction in the first instance to hear, try, and determine charges for crimes or offenses in the cases enumerated in section 1, article 1, title 3, chapter 2 of the fourth part of the Revised Statutes, and also all complaints and charges against any person for the commission of any of the acts and offenses designated in the first section of title 5, chapter 20, of the first part of the Revised Statutes, and the acts amendatory thereof, and also all offenses triable by courts of special sessions in towns and in cities of this state, and also the following charges (which are hereby declared to be offenses, and the persons committing the same disorderly persons), to wit: "Indecent exposure of the person; *disturbing the public peace, or tending to disturb them or it by using loud and tumultuous conduct; either loud, vulgar, insulting, abusive or threatening language or behavior, or fighting or quarreling to the disturbance of the people, or the public peace and quiet,*" &c., &c.

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By the same section, when any person charged with an offense of which the recorder is given jurisdiction is convicted thereof before him, the recorder has "power to punish by a fine not exceeding \$250, or by imprisonment in the Albany penitentiary at hard labor for a term not exceeding one year, or by both such fine and imprisonment."

The recent case of *Isadore Bayard* (61 *How.*, 294), did not present the question which this one involves. Bayard had been convicted of the crime of petit larceny, and upon such conviction was condemned to an imprisonment for the period of nine months. As the general law of the state had defined the crime of petit larceny, and had fixed the maximum of imprisonment on conviction thereof at six months, it was held that so far as the act of 1880 undertook to give to the recorder of the city of Cohoes greater power of punishment than was conferred by the general law, it was unconstitutional and void (*See also Matter of Owen Coughlin, ante*, 34, in which the Bayard case is reviewed, and its conclusions sustained by reference to section 1 of article 14 of the constitution of the United States). The punishment, however, of the offense of which William Trimble is convicted, is not specially prescribed by the general law of the state. It is one against the public peace not amounting to a felony, and is, therefore, a misdemeanor at common law (*Barbour's Criminal Law*, 222), and by the Revised Statutes (3 *R. S.* [6th ed.], 983, sec. 103), and as no special punishment is prescribed, punishable by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment.

If the act of 1880 (so much of which as is applicable to the case under consideration has been given) has been borne in mind, it will be remembered that the recorder of the city of Cohoes is specially clothed with power to try the offense of which the prisoner has been convicted, and the power of punishment conferred therefor is precisely in accordance with the general law. I therefore fully agree with the recorder (GOULD) of the city of Albany, before whom this prisoner

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has been brought in a similar proceeding to the present, that the sentence of such prisoner was within the power of the recorder of the city of Cohoes.

The second question which this application presents is, has a record of the conviction of the prisoner been filed as the law requires?

That a record of conviction must have been filed, if the prisoner is to be detained, is conceded, and the necessity of such filing not only has been decided, but its requisites as to form have also been passed upon by myself (*Matter of Travis*, 55 *How.*, 347). It is claimed, however, in behalf of the people that the record in this case has been filed, though a search of the county clerk's office of the county of Albany has failed to discover it.

It is difficult, upon the *ex parte* affidavits which have been presented, to determine whether such commitment has or has not been filed as the law requires. Instead, therefore, of finally disposing of the present application upon the evidence presented, I have concluded to hear the testimony orally which either party may choose to submit upon that point, and for that purpose will, after consultation with counsel, name a day for such hearing either before a referee or before myself. In the meantime, and until a final decision, the prisoner will remain in custody.

The decision of recorder GOULD upon the previous application is no bar to the present (*People ex rel. Laurence agt-Brady*, 56 *N. Y.*, 182, 191, 192). Whilst, however, this is conceded as a legal proposition, a new application presenting the identical questions previously decided by a competent court or officer should not be encouraged, but parties should, as a rule, be remitted to their remedy of review in an appellate court. In the present case, the recorder of the city of Albany, who heard a previous proceeding of a like character to the present by the prisoner, reached the conclusion that the record of conviction had been filed. This was, however, some time since, and a further inquiry may develop additional testimony upon

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that point. For this reason the parties will be given another opportunity to present their evidence. I cannot, however, avoid the conclusion that it would save much trouble if the recorder would file his convictions, as the law directs, in the county clerk's office. Their deposit in a certain pigeon hole in the Cohoes station-house, with the expectation that an employe of the county clerk's office will take them thence and properly file them, is scarcely what the law demands, when a duty is devolved upon him to "cause such certificate to be filed in the office of the clerk of the county in which such conviction shall be had." Undoubtedly, what has been done was with the best intentions, and might ordinarily secure the desired result by the filing of the record. Sometimes, however, and this case illustrates the danger, the document will be missing, and a compliance with the law thus made difficult to prove.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. WILLIAM H.
MACY and another.

*Incumbrance upon pier — Action by the attorney-general for its removal —
Foreign commerce.*

Where, in an action to compel the removal from an East river wharf of a building erected by the owner of the wharf for the exclusive benefit of his own business, and without a written license from the department of docks, it appears that the wharf has been used by the public as a highway and for the loading and discharging of sailing vessels engaged in foreign commerce and having a draft of more than eighteen feet of water:

Held, that the building is an incumbrance, an interference with the dominant right of the public, and must be removed, and that the attorney-general has the right to bring the action.

Special Term, August, 1881.

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W. W. Goodrich, for plaintiff.

Willard Bartlett, for defendants.

VAN VORST, *J.* — This is an action brought by the attorney-general in the name of the people to restrain the further erection and to compel the removal of a shed which has been partly built on pier forty-five East river. The defendant Macy is one of the owners of the pier, and the other defendant is the builder of the shed. The shed is described in the complaint to be a permanent structure of wood and iron and other materials forming a house or shed to inclose and cover the pier for the private convenience of the defendant Macy to facilitate the business of a line of steamships, and so as to obstruct and interfere with the free use of the pier by the public, and to deprive ships and vessels which have used the pier from loading and discharging cargo thereat as heretofore.

In view of the decision of this court in the case of *The People agt. Mallory* (2 *N. Y. Sup. Ct. R.*, 76), in which it is distinctly held that the wharves and piers of New York city are, in substance, public highways, not to be incumbered by erections of that character without express legislative sanction, it must be held, under the facts of this case, that the further erection of the shed in question should be enjoined, and that the portion already built should be removed.

This structure is projected and partially completed for the private convenience of the defendants to facilitate their business, and, doubtless, for the protection of property incident to such business, but in so far as it hinders the free use of the pier by the general public it is an unlawful incumbrance. The pier cannot be materially incumbered, or its full use, for purposes connected with navigation by the general public, be interfered with (*Com. of Pilots agt. Clark*, 33 *N. Y.*, 265).

The pier is, in substance, in the complaint described as a public pier, and is alleged to have been in use as such for over forty years last past, and to have been used and resorted

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to by ships or vessels engaged in commerce in the port of New York, and between that port and other places in this country and Europe. Whatever right the defendants have acquired in any way to the pier is in subordination to the rights of the general public for purposes connected with navigation. At least such rights may not be abridged by the erection of the shed in question.

The plaintiffs refer in general terms, in their complaint, to certain provisions contained in chapter 249 of the Laws of 1875. This whole subject is under the control of the legislature of the state, and its will is supreme. By force of that specific legislation, powers are conferred upon persons owning or leasing a pier, and who are engaged in the business of steam transportation, to erect and maintain sheds on the piers of the city, "provided they shall have obtained from the department of docks of said city a license or authority to erect or maintain the same." The allegations in the complaint in that regard are sufficient to show that the defendant Macy is engaged in the business of steam transportation, and is entitled to the privileges conferred by the act, upon compliance with the *proviso*, unless prohibited by the provisions of section three of the same act.

It has already been decided in this action that the license provided for in section one of the act of 1875 must be in writing, and as the defendants have produced no written license or authority, they are in no position to insist upon holding the erection they have placed upon the pier, under the provisions of that act.

But section three of the same act interposes an important limitation. It provides "that it shall not be lawful to interfere with the free public use, as now enjoyed, of any wharf, pier or bulkhead adjacent thereto, in the navigable water of the East river, in the city of New York, which has been heretofore used for the loading and discharging of sailing vessels regularly employed in foreign commerce, and having a draft of more than eighteen feet of water." The evidence justifies

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the conclusion that the pier in question had been so used by vessels, many of them foreign vessels, regularly employed in foreign commerce, having a draft of more than eighteen feet of water. Much evidence was introduced by both parties upon this subject, which I have carefully considered, as well as the able argument of Mr. Bartlett, the defendants' counsel, but I cannot accept the result reached by him — that as to several of the vessels, they were not so “regularly” engaged. The statutory requirement is not that they should be so exclusively employed; and the fact that several of the vessels went also to domestic ports for commercial purposes does not deprive them of the character of vessels “regularly engaged” in foreign commerce.

It may be, as is urged in this connection on the behalf of the defendants, that an action to remove the incumbrance from the pier could be maintained by the department of docks, or by the mayor, aldermen and commonalty of the city of New York. Ordinarily, and properly enough, actions to remove erections and incumbrances from the streets and avenues of the city — and the piers are held to be extensions of the streets — are brought in the name of the municipal corporation, and by its authority, or by such officer or body directly charged by the legislature with a duty in the premises and with authority to act in that direction.

But I cannot accept the defendants' contention that, under the pleadings and evidence, the people cannot maintain this action. In the subject-matter of this controversy, the people at large — the general public — have a direct interest, and the incumbrances in question, under the decisions, are encroachments upon general rights.

To maintain this action, it is sufficient to show that a wrong is done to the people of the state or their rights infringed; for in such case the attorney-general may, in the name of the people, bring an action for appropriate redress in virtue of the right of the prerogative incident to sovereignty. The public piers are more than extensions of streets and avenues.

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They reach out into the navigable waters, which are the ways of commerce, to which they are important adjuncts; and all unauthorized acts by which their free and unincumbered use, by those engaged in commerce and navigation and who have a right to approach and use the piers, is permanently hindered, are encroachments upon the rights of the people of the state. A permanent shed, as has been already stated, has been adjudged to be an illegal incumbrance of such a character. And as the defendants do not appear to have any legal right to incumber the pier with such a structure, the action by the people for appropriate relief through its removal is clearly proper.

There must be judgment for the plaintiffs, and the relief asked for granted.

SUPREME COURT.

FRANK FRITZ agt. MICHAEL MUCK, as president of the St. Stephen's Society.

Voluntary joint association — Right of an expelled member thereof to bring action for restoration to membership — Such action well brought against the president — Propriety of expulsion may be reviewed in suit — Member entitled to notice — Right to suspend weekly payments not to be passed upon by the court.

An action may be maintained against the president of a voluntary joint association by an expelled member thereof, to compel his restoration to membership.

The object is to place himself in a position where he can reach the joint property; and in this view the action is in regard to the joint property and rights of the association, and is within the purpose designed to be accomplished by the acts of 1849 and 1851, and that was, that where an association of the character there specified was liable to be sued it should not be necessary to make all the members parties.

The propriety of the expulsion may be reviewed in such suit.

Although the rules of the association did not provide that notice should be given, they were in this respect unreasonable and the member to be

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expelled should have notice and an opportunity should be given to him to be heard.

The right to recover certain weekly payments which were suspended by the expulsion will not be passed upon by the court.

Onondaga Special Term, August, 1881.

1. THE defendant Michael Muck was during the years 1878 and 1879 the president of a German voluntary joint association, named in the complaint herein, consisting of about ninety members, who resided at Syracuse, New York, and who were jointly possessed of, interested in and entitled to, certain property accumulated by said society from initiation fees, dues and assessments collected from the members.

2. The purposes and objects of this association were to promote christianity and to encourage an observance of the Catholic religion, and to secure to the various members of said association mutual aid in the days of sickness and death.

3. By the terms of their constitution the various members of the association agreed to, and were bound to pay from time to time various fixed dues and assessments, and also to render such other services or assistance to their fellow members requiring the same as they should from time to time be directed to perform.

4. In consideration of the various agreements and obligations assumed by the members, the said association by its constitution provided, among other things, that every member should receive in case of sickness, or in case of inability to work, three dollars for every seven days, if no arrears of payment exist, and that aid received from the society is not to be considered a gift, but an absolute right founded upon money advanced by the members.

5. During the year 1869 the plaintiff, being possessed of the necessary qualifications, duly became a member or associate of said society, and continued as such from that time to the time of the alleged expulsion hereinafter mentioned, and during said time, in pursuance of the provisions of the con-

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stitution of said society, paid his dues and assessments and performed the various services required of him.

6. On or about the 24th day of April, 1878, the plaintiff became ill, and thereupon notified the proper officer of the association of the fact, as provided by the rules of the society, and thereupon the said association, or its relief committee, being satisfied of the fact of sickness paid the plaintiff the sum of three dollars per week from the 1st day of May, 1878, to the 10th day of July, 1878, after which time the said association discontinued said payments and have not since paid the plaintiff anything, but have refused to pay him.

9. On the 28th July, 1878, the said society, at a regular meeting thereof, adopted a resolution expelling the plaintiff therefrom "on account of being falsely sick," that being the ground expressed in the resolution, and under this resolution the association claims that the plaintiff has forfeited all rights under the constitution and by-laws of the society.

10. By one of the by-laws of the association, it is provided that whoever falsely reports himself sick, or, in fact, imposes upon the society in any way, shall be fined in money, suspension or expulsion. This by-law was adopted after the plaintiff became a member, at a meeting at which he was present. The resolution of expulsion was based on this by-law.

11. The plaintiff had no notice of the charge against him referred to in said resolution, or any opportunity of being heard in regard thereto, and he had no notice or knowledge of any proposed action in regard thereto at said meeting, and he was not present at said meeting. The constitution or by-laws did not make any provision for notice in such cases.

12. By the constitution and by-laws, means were provided by the society for ascertaining, through a committee, as to the fact of sickness or inability to work, and prior to the 28th July, 1878, such committee examined into the facts of plaintiff's case and reported that he was able to work; this report was adopted by the society, and, thereafter, at the same meeting, the said resolution of expulsion was passed.

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13. The said association at or prior to the 28th July, 1878, as a body, or by its committee duly appointed, according to its rules, determined that the plaintiff was not physically in a situation to be entitled to the said weekly relief, and such determination was not made in bad faith or by fraud, and since that time no new application for relief has been made by the plaintiff.

14. That said plaintiff has no means of obtaining relief from the consequences of said expulsion, within said society, nor in pursuance of any of the provisions of its constitution or by-laws.

15. The plaintiff offered to pay his dues as a member of said association, and the said society refused to receive the same on the alleged ground that he had been expelled therefrom.

Louis Marshall, for plaintiff.

I. D. Garfield and *J. C. Hunt*, for defendant.

MERWIN, J.—The defendant Muck is the president of an incorporated association, consisting of about ninety members, formed for the purpose, among other things, of furnishing aid to its members in sickness, and having a fund arising from the payment of initiation fees, fines and assessments.

The plaintiff became a member in 1869, and continued to be such till the 28th of July, 1878, when the association, at a regular meeting, passed a resolution expelling him on account of being falsely sick. The plaintiff had, from about May first to July tenth, received the weekly benefit allowed to the sick. This action is brought on the equitable side of the court, and this plaintiff in his complaint asks that he be restored to his rights as a member or associate of said association, and that the said association account to him for the amount of weekly stipend or allowances which have accrued since the 10th of July, 1878, and be directed to pay the same

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to this plaintiff, and that he may have such other and further relief as shall be just and equitable.

The first question to be disposed of is whether an action of this kind can be brought against the president of the association under chapter 258 of the Laws of 1849, as amended by chapter 455 of 1851. In *Roobe agt. Russell* (2 *Lans.*, 244, *General Term, First District*, 1869), this question was discussed as well as the merits of the case, but on which ground the case was decided does not appear. In *Olery agt. Brown, President* (51 *How.*, 92), it was held at special term that the action could be properly brought in that form.

The fact that plaintiff is himself one of the members does not prevent suit being brought in that form, if in other respects it is proper (*Westcott agt. Fargo*, 61 *N. Y.*, 542; *Sallsman agt. Shults*, 14 *Hun.*, 256).

The object of the plaintiff in this action is to place himself in a position where he can reach the joint property. In that view the action is in regard to the joint property and rights of the association. It is within the purpose designed to be accomplished by the acts of 1849 and 1851, and that was, that where an association of the character there specified was liable to be sued, it should not be necessary to make all the members parties. The president, as such, should represent the whole. The expression "joint rights," in the statute, should receive a liberal interpretation in order to accomplish the remedy designed by the statute. The case of *White agt. Brownell* (2 *Daly*, 356), was similar to the present one, but the point now under consideration was not raised.

In my opinion, the present action, so far as the form in which the defendant is sued, is properly brought.

Coming to the merits of the case, the question is whether the propriety of the expulsion of plaintiff can be reviewed here, and if so, whether it was proper. Cases are cited showing that the proper remedy is by *mandamus* where parties seek restoration to the membership of a corporation (*People agt. N. Y. Benevolent Society*, 3 *Hun.*, 361, and cases cited).

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This does not, I think, apply to an unincorporated association (see *White* agt. *Brownell*, 2 *Daly*, 329, 358). In the latter case, if the party has any remedy, it is by suit.

The defendant's association, in this case, had adopted a by-law authorizing expulsion for the cause alleged against the plaintiff. The plaintiff was bound by this by-law. It was passed in 1874, while he was a member, and he was, presumably on the evidence, present at its passage. The association, therefore, acted within its jurisdiction when it expelled the plaintiff. No notice was given to the plaintiff of the charge; no opportunity given to him to be heard. The rules of the association did not provide for any notice to be given. In this respect they were not reasonable. The charge against plaintiff involved not only expulsion, but disgrace. He was not present at the meeting and it was one at which he was not obliged to attend. Had he been expelled after notice and in accordance with the rules, this court would not have interfered (2 *Daly*, 329; 2 *Whart.*, 309; 52 *Penn.*, 125). As the case stands he is entitled to relief in this regard.

But the defendant's counsel suggests that the evidence shows that plaintiff was guilty of the charge, and therefore relief should not be given by reason of want of notice. This calls on the court to enforce the rules of the organization and try the party in a manner not provided for by them. This position is not, in my opinion, tenable.

The expulsion then being invalid, what about the weekly payments which were then suspended; can the right to recover them be passed upon here? Those were payable in case of sickness or inability to work. The association, by its rules, provided a means of ascertaining the circumstances under which, or by reason of which, the party should be entitled. The degree of sickness or inability was, in the very nature of the case, an open and indefinite matter. How much departure from the standard of full health would be necessary, or what the standard should be, or what would constitute inability

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to labor, would, in many cases, be very difficult to determine by any legal rules.

The propriety, therefore, if not necessity, of leaving this matter to be determined by the society or its committee, according to its own rules, assented to by all its members is, to my mind, very apparent. And as long as the society and its committee acted in good faith, without fraud, their determination should be deemed conclusive.

Fraud is not in terms alleged in the complaint. Assuming that it is inferentially, the question is whether it is established by the evidence. In my opinion it is not. The case of plaintiff was a peculiar one, physicians disagreed about it; it was under consideration for several weeks before the final action of the society. As the case then stood, I don't think fraud or bad faith can be fairly charged against the society or its committee. Their determination, therefore, that the plaintiff was not then in a situation to be entitled to the weekly relief is conclusive. No action has since been taken by them on the subject, or any new application made by plaintiff. If, on proper application, they should refuse to act or act in bad faith, what remedy the plaintiff would have is not necessary to here determine.

My conclusion is that the plaintiff is entitled to a judgment declaring the said expulsion invalid and restoring him to all his rights as a member of said association. He should also recover the costs of this action.

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CORTLAND COUNTY COURT.

PEOPLE *ex rel.* A. D. BROWN agt. VAN HOESEN, sheriff, &c.

Excise law — Chapter 628, Laws of 1857 — Execution against the body valid without any teste — Residence — Person in jail for penalties for selling liquor not entitled to the liberties of the jail — Code of Civil Procedure, sections 23, 24, 149, 1366.

An execution is valid without any teste.

A person in jail for penalties for selling liquors in violation of chapter 628 of the Laws of 1857, is not entitled to the liberties of the jail.

Section 32 of this act, which provides that "the person or persons against whom judgment shall be rendered, shall not be entitled, under any execution issued on such judgment, to the liberties of the jail," is not repealed by the Code of Civil Procedure.

September, 1881.

A. P. SMITH, *County Judge.* — On the first day of September, inst., upon the petition of A. D. Brown, the relator, I issued a writ of *habeas corpus* directing the sheriff of Cortland county to produce before me this day the body of the relator, with the cause of his imprisonment. In obedience to this writ he returns that he holds him by virtue of an execution against his body issued out of the Cortland county court, upon a judgment entered therein for a violation of the excise law of 1857. This return is traversed by the relator, who alleges that at the time when this execution was issued to the sheriff of Cortland county, the relator was not a resident of this county but resided in Tompkins county, and that no execution against his property was issued and returned prior to the issue of the execution on which he is imprisoned; that the execution on which he was arrested is void because not tested according to the Code of Civil Procedure, and that he is entitled at least to the liberties of the jail by reason of having tendered to the sheriff the bond required by law.

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Most of the facts, except the residence, are conceded. The case is an important one and has been ably presented by both sides, and from the vast number of authorities cited I conclude that all the law of this and other states bearing upon the questions involved have been presented. I shall therefore give to the three questions involved as much attention as my time will permit.

First. The relator insists that the execution is void because not tested. Section 23 of the Code of Civil Procedure provides :

“A writ or other process issued out of a court of record must be tested except where it is otherwise specially prescribed by law, in the name of a judge of the court, on any day,” &c.

Section 24 of the same Code provides :

“A writ or other process, issued out of a court of record must * * * be subscribed or indorsed with the name of the officer by whose direction it was granted, or the attorney for the party or the person at whose instance it was issued. *A writ or other process thus subscribed or indorsed is not void or voidable by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the tests thereof,*” &c.

While undoubtedly an execution is embraced in the terms “writ or other process,” yet when we read the general requisites of an execution as contained in section 1366 of the new Code, which is substantially the same as section 289 of the old Code, and find no provision as to a test to an execution, and when we consider the fact, that for over thirty years the practice has prevailed under a similar provision of issuing executions without a test, and no decision can be found holding it irregular, though the Revised Statutes all that time contained a similar provision as to tests of writs and processes (3 *R. S.* [5th ed.], 282, sec. 20). I am of the opinion that an execution is valid without any test. And were this not so it is a defect not affecting the rights of the parties and is amendable by the court at any time when the question is raised (*Herman on Executions*, pp. 54 and 55, secs. 67 and 68 ; *McIntyre*

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agt. *Rowan*, 3 *Johns.*, 144). In the last case the court allowed this very amendment after the defendant had been arrested and while he was in prison on the process. No authority to the contrary is produced and I can find none.

Second. The relator claims that he was a resident of Tompkins county when this execution was issued, and that no execution was issued against his property to that county and returned unsatisfied. Up to the 24th day of August, 1881, the relator was and had been for years a resident of Homer. He knew of this judgment. On that day under-sheriff Borthwick called upon him with a property execution and demanded pay thereon, and was told by the relator that he had no property. This was in the forenoon. About three or four o'clock in the afternoon of the same day he returned the execution unsatisfied. That same afternoon the relator took a few articles of personal property and went over the line of the county to McLean and stopped at the hotel, and took considerable pains to announce publicly that he had established that as his permanent residence. Of course the plaintiffs knew nothing of this declaration of intention to seek a new home, and on the 27th day of August, 1881, they directed their attorney to issue an execution against the person of the relator, which he did, and on the twenty-ninth day of August the relator having, for some purpose not disclosed, revisited the scenes of his childhood, was taken at Homer on the execution. Without saying more than to state the facts I am satisfied that there was no such change of residence as prevented the issue of the execution to the sheriff of Cortland county, and that this colorable change of residence, under the circumstances, should not be permitted to stand in the way of an enforcement of the collection of this judgment. If such changes of residence are to be recognized by courts, no lively man with a single trunk can ever be captured on a body execution. The courts do not recognize technicalities to aid in the defeat of justice. All rules are made with a view to promoting justice, and where they are sought to be evaded, as is

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apparent here, the courts must disregard the evasion, and determine the question as though no evasion had been attempted.

Third. The only remaining question is whether a person in jail for penalties for selling liquors in violation of chapter 628 of the Laws of 1857 is entitled to the liberties of the jail. By section 32 of that act it is provided :

"SEC. 32. In any judgment rendered or recovered on any bond to be given under this act, or for any penalty incurred under this act, the person or persons against whom such judgment shall be rendered shall not be entitled, under any execution issued on such judgment to the liberties of the jail."

The execution on which the relator is held was issued under this act for penalties incurred thereunder, and is therefore subject to the provisions thereof unless this action is repealed by subsequent legislation.

The relator contends that this section is repealed by the new Code which provides :

"SEC. 149. A person in the custody of a sheriff by virtue of an order of arrest ; or of an execution in a civil action ; or in consequence of a surrender in exoneration of his bail, is entitled to be admitted to the liberties of the jail upon executing a bond to the sheriff as prescribed in the next section.

It is admitted that the bond specified in the next section was tendered to the sheriff and he was requested to allow the relator the liberties of the jail, which he refused to do, and the question to be considered is whether in such refusal he was justified by the law. In other words, does section 149 of the new Code repeal section 32 of chapter 628 of the Laws of 1857. The last Code provides nothing new upon this subject. The Revised Statutes (3 *R. S.* [5th ed.]), 733, sec. 61, provided : "Every person who shall be in the custody of the sheriff of any county by virtue * * * and of any execution in a civil action * * * shall be entitled to be admitted to the liberties of the jail, &c., upon executing a bond," &c. This was the law when the act of 1857 was

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passed and has been the general law in this state, at least since 1813, subject to the modification of statutes upon special subjects passed from time to time, like the act of 1857. The codifiers in charge of the new Code did not propose to frame new laws. They were appointed for the purpose of codifying and bringing into harmony the laws then existing. In doing so they have largely, as in this case, drawn upon the old and scattered statutes, employing the very language of those statutes and very clearly marking and specifying the statutes which should be repealed, and only changing those the interpretation placed upon which seemed to demand such change. And lest it might be held that certain statutes had been repealed by implication, the legislature, on the 10th day of May, 1880, passed an act specifying the acts and parts of acts repealed (*Laws of 1880, chap. 245, vol. 1, p. 367, &c.*). An examination of that act will show that while certain acts passed in 1857, and certain parts of the Revised Statutes are repealed, this provision, that violators of the excise law should not have the liberties of the jail, is not mentioned, and nowhere in the new Code or any enactment to which my attention has been directed has this provision been mentioned. While it was the law that all persons imprisoned in civil actions should be granted jail liberties on giving a bond to the sheriffs, the legislature in 1857 deemed it proper to say that an exception should be made against any who should be found guilty of a violation of the excise law, and the single question is whether the legislature that passed the new Code has shown any intention to repeal that wise exception. I say wise, because any act that takes out the element of close confinement from the penalty for violation of the excise law robs it of its most sacred and binding force. The legislature well understood that the great mass of those who would violate the excise law were pecuniarily irresponsible. If they could obtain the liberties of the jail, no matter how many judgments were piled up against them, they might continue to defy public sentiment and the law, and while the judgment was being

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enforced by the nominal imprisonment of the law's violator, he might still be enjoying the profits of fresh violations. It was a wise provision of law which made this state of things impossible, and nothing but the clearest intent on the part of a subsequent legislature to repeal it should be recognized. We have seen that it has not been directly repealed. Has it been repealed, as claimed by the relator, by implication? The repeal of a statute when not done directly must be gathered from some indicated intention of the legislature. What is there in the acts passed subsequent to 1857, showing an intention to repeal the provisions of section 32 of chapter 628? It is not mentioned in any subsequent act as being repealed; it is not referred to in the repealing act of 1880; it is not referred to in the new Code; the provisions of section 149 above quoted are the same as those in existence when the act of 1857 was passed, they have only been rewritten and collated in the codification of the laws. Had a new law been passed creating the provisions of section 149, the question would have been more difficult, for we might have said that the passage of this new provision showed an intention on the part of the legislature to repeal the old. But this is not the case. The codifiers simply republish a law older than the codifiers themselves. But suppose it had been a new provision, how then would the matter stand? A repeal of statutes by implication is not favored by the courts. The cases upon that point are very numerous. I need but mention a few (*People agt. Smith*, 69 *N. Y.*, 175; *Matter of Comrs. of Central Park*, 50 *N. Y.*, 493; *Matter of the Evergreens*, 47 *N. Y.*, 216; *Pursell agt. N. Y. Life Ins. and Trust Co.*, 10 *Jones & S.*, 383; *People agt. Quigg*, 59 *N. Y.*, 83).

I have carefully examined the numerous authorities cited by the attorney for the relator and find no conflict in the law. Thus in *Dash agt. Van Kleeck* (7 *John.*, 477) the court held that the subsequent act introduced a new rule of law, and thus showed an intention in the legislature to repeal the former law. The same may be said of *Wood agt. Wellington* (30 *N.*

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Y., 218), and all the other cases cited by relator. In the case under consideration the law claimed to be repealed by the Code is one relating especially to one specific subject — the restriction of the sale of intoxicating liquors. It is in that sense a special statute. On a review of all the authorities I am satisfied that the true rule as laid down by the court of appeals in 50 New York, 497, is applicable to this case. “The law does not favor a repeal of statutes by implication. * * A special and local statute *providing for a particular case or class of cases* is not partially repealed or amended as to some of its provisions by a statute general in its terms, provisions and application, unless the intention of the legislature to repeal or alter the particular law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it” (*Capeu agt. Glover*, 4 Mass., 305). I find no evidence of any intent, express or implied, to repeal the provision of the act of 1857. It follows that any one imprisoned on a body execution issued on a judgment for penalties incurred for violations of the excise law, is not entitled to the liberties of the jail and the sheriff of Cortland county was right in refusing them to the relator.

The relator is “detained in custody by virtue of the final judgment of a competent court of civil jurisdiction and the execution issued upon such judgment,” and in such case the statute requires all courts to forthwith remand such party (3 R. S. [6th ed.], 878, sec. 55). An order will be entered accordingly.

Finn agt. Finn.

SUPREME COURT.

MARGARET FINN agt. TIMOTHY FINN.

Divorce — action for — Defendant resists upon the ground that the relation of husband and wife never existed between them, and asks that the contract of marriage entered into by them be declared null and void — Evidence of former marriage of defendant — Estoppel — Affirmative relief — Code of Civil Procedure, section 531.

The defendant, in 1848, contracted a legal marriage with Catharine Murphy, at London, England, which still subsists. The defendant emigrated to the United States in 1849, and in 1850, at the city of Elmira, he and the plaintiff entered into a marriage contract, and afterwards cohabited as husband and wife, at that city, until 1860, when the first wife appeared at Elmira. The parties immediately separated, the plaintiff resumed and has ever since used her maiden name. The defendant conveyed all his property to the plaintiff and left the state. About 1863 the defendant returned to Elmira, and entered into a contract relating to property with the plaintiff, under her maiden name. Since the separation in 1860 the parties have not lived together as husband and wife, but both parties have resided at that city as unmarried persons. Shortly before the commencement of this action, the defendant commenced to live and cohabit with another woman. At the time of the intermarriage of the parties the plaintiff had no knowledge of the prior marriage of the defendant. The plaintiff asks for a divorce upon the ground of adultery, which the defendant resists upon the ground that the relation of husband and wife never existed between them, and asks that the contract of marriage entered into by them be declared null and void. The celebration of a marriage contract between the parties to this action, their subsequent cohabitation as husband and wife, and subsequent sexual intercourse between the defendant and another woman, is established. As a defense, and as a ground for a decree of nullity, the defendant established, by undisputed evidence, that at the time of the marriage he had a living wife:

Held, that the relation of husband and wife lies at the very foundation of a divorce *a vinculo*, and it must be affirmatively established before a judgment of divorce can be rendered.

Held, also, that a marriage contract entered into by a person having a husband or wife living, with a third person, is utterly void.

Held, also, that the evidence of the former marriage was competent in this case, and, it being established, is a defense to the action. When the plaintiff established the solemnization of a marriage contract between

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the parties, the defendant was not estopped from proving the former marriage, nor was he estopped from asserting the fact as a defense. *Held*, further, that under section 501 of the Code of Civil Procedure, in an action for divorce *a vinculo*, a defendant may have affirmative relief.

Chenango Special Term, August, 1878.

SEPTEMBER 23, 1848, the defendant contracted a legal marriage with Catharine Murphy, at London, England, which still subsists.

In the spring of 1849, the defendant emigrated to the United States. October 16, 1850, at the city of Elmira, he and the plaintiff entered into a marriage contract, and afterwards cohabited as husband and wife at that city, until 1860, when the first wife appeared at Elmira.

The parties immediately separated, the plaintiff resumed and has ever since used her maiden name. The defendant conveyed all of his property to the plaintiff and left the State. About 1863 the defendant returned to Elmira and entered into a contract relating to property with the plaintiff under her maiden name. Since the separation, in 1860, the parties have not lived together as husband and wife. Since the defendant returned to Elmira, both parties have resided at that city as unmarried persons. Shortly before the commencement of this action, the defendant commenced to live and cohabit with another woman.

At the time of the intermarriage of the parties, the plaintiff had no knowledge of the prior marriage of the defendant.

The plaintiff asks for a divorce upon the ground of adultery, which the defendant resists upon the ground that the relation of husband and wife never existed between them, and asks that the contract of marriage entered into by them be declared null and void.

John T. Davidson, for plaintiff.

H. Boardman Smith, for defendant.

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FOLLETT, J.—The celebration of a marriage contract between the parties to this action, their subsequent cohabitation as husband and wife, and subsequent sexual intercourse between the defendant and another woman, is established.

As a defense, and as a ground for a decree of nullity, the defendant established by undisputed evidence that at the time of the marriage he had a living wife. The statutes (2 R. S., 139, sec. 5) declare the contract between the parties to this action "absolutely void."

The rule was the same at common law, and under such a contract, the parties do not become husband and wife *de facto* (*Riddlesdon* agt. *Hogan*, *Crokes' Eliz.*, 658; *Fenton* agt. *Reed*, 4 *Johnson*, 52; *Williamson* agt. *Parisian*, 1 *Johns. Ch.*, 389; 2 *Kent's Com.*, 79; 1 *Blackstone's Com.*, 436.) The relation of husband and wife lies at the very foundation of a divorce *a vinculo*, and it must be affirmatively established before a judgment of divorce can be rendered. A divorce is only granted for causes occurring while the relation of husband and wife exists, and it presupposes and affirms the pre-existence of a valid marriage (*Manjue* agt. *Manjue*, 1 *Mass.*, 240; *Zule* agt. *Zule*, *Saxton*, N. J., 96; *Dobbs* agt. *Dobbs*, 3 *Edwards Ch.*, 377; *Pugsley* agt. *Pugsley*, 9 *Paige*, 589; *Mayhew* agt. *Mayhew*, 2 *Phillimore*, 11; *Bird* agt. *Bird*, 1 *Lee*, 623).

So utterly void is a marriage contract entered into by a person having a husband or wife living, with a third person, that the third person may enter into a new marriage contract without a decree declaring the prohibited marriage void. This marriage is no impediment to a valid marriage by the plaintiff with another person (*Patterson* agt. *Gaines*, 6 *How* [U. S.], 550; *Gaines* agt. *Relf*, 12 *How*. [U. S.], 472; 1 *Bishop on Marriage and Divorce* [5th ed.], sec. 299).

I do not understand that the plaintiff's counsel controverts any of the above stated elementary principles of law. But he insists that when the plaintiff established the solemnization of a marriage contract between the parties, the defendant was

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estopped from proving the prior marriage, and though proved, the defendant is estopped from asserting the fact as a defense. An estoppel is a conclusive admission which cannot be denied or controverted.

Between persons, the doctrine of estoppel is applied to prevent the proof or assertion of the truth, as a means of promoting justice. But it has no application to this action.

The most solemn admission which a party can make, that he has committed adultery, is sufficient to authorize a judgment of divorce. The state will not permit an estoppel.

To marriage contracts, and to actions for their dissolution, there are three interested parties, the state, the man, and the woman. Unlike other contracts they cannot be entered into at the discretion or caprice of the contracting parties, nor dissolved by mutual agreement.

All civilized governments reserve the right to prohibit the intermarriage of certain persons, and the right to determine when the marriage relation legally entered into may be dissolved.

A distinction is made by the statutes of this state between marriage contracts which are void and voidable. Those which are voidable for fraud or duress, cannot be declared so upon the application of the person perpetrating the fraud (2 *R. S.*, 143, *sec.* 30). But by section 22, 2 Revised Statute, 142, it is expressly provided that either party may apply for a judgment of nullity in case either has a husband or wife living at the time of the marriage. Under this section such a marriage has been declared void upon the application of the guilty party (*Anonymous*, 15 *Abb. N. S.*, 171, 307, 311). The distinction between void and voidable marriages as affecting the right of the guilty party to apply for a decree of nullity, is recognized in *Norton agt. Teaton* (3 *Phillimore*, 161); *Ponder agt. Graham* (4 *Florida*, 23); *Bishop on Marriage and Divorce* (5th ed., *sec.* 300). In *Ponder agt. Graham* the parties entered into a marriage contract with full knowledge that the wife had a living husband. After living together as

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husband and wife for fifteen years, the man died, leaving a will, by which he made provision for, and recognized the woman as his wife; she refused to accept the provisions of the will, and brought an action for the recovery of her interest in the estate as widow. The executor defended upon the ground that the marriage was null and void. The doctrine of estoppel was sought to be applied and it was said: "The doctrine of estoppel has no application to the case. It is not denied that as respects third persons, a man who lives with a woman, and holds her out as his wife, is estopped from denying it when charged with liabilities as her husband, but it cannot affect the rights of property, even as between themselves.

"When any civil disability, as prior marriage exists, the marriage is void absolutely, and no civil rights can be acquired under it, and it may be inquired of in any court where rights are asserted under it, though the parties be dead.

"It is competent for a party to set up the nullity of his first marriage in bar of a sentence praying the nullity of the second marriage (*Shelford*, 332). Either of the parties to a marriage, or the parent or guardian of either of the parties, or any other persons interested may apply to the court, and they have a right to a declaratory sentence, and it is upon the ground that the public, as well as the parties in interest, have a right to know the real character of these domestic relations" (*Shelford*, 334). In this case, both parties having knowledge of the impediment, it is different from the one at bar; but if no civil rights can be acquired under such a marriage there is nothing for an estoppel to act in favor of. Courts for the promotion of private justice in a given case, ought not to adopt a rule of evidence, or so apply the doctrine of estoppel as to render valid a marriage (through the acts of the parties operating by way of estoppel), which the statute expressly prohibits and declares null and void, as contrary to public policy, and leading to social evils which the state has an interest in preventing. Should it appear in an undefended action that the marriage

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sought to be dissolved was null and void, it would be the duty of the court to refuse a divorce, otherwise it would affirm as valid that which the statute declares void. If the doctrine of estoppel can be applied to this case, it could to an incestuous marriage, if one of the parties were innocent. A decree of divorce declaring this marriage valid, and dissolving it, would not affect the *status* of the first, or true wife.

A divorce for the adultery of the husband does not deprive the wife of her right to dower in real estate acquired previous to the decree (*Wait agt. Wait*, 4 *N. Y.*, 95).

Both wives surviving the defendant, both would be entitled to dower. I can find no case where the doctrine of estoppel has been applied in support of a contract, or relation, which is both *malum in se* and *malum prohibitum*.

The doctrine of estoppel was rejected in *Robbins agt. Potter* (98 *Mass.*, 532); *Holmes agt. Holmes* (4 *Lansing*, 388), as inapplicable to actions affecting the *status* of husband and wife.

In *Johnson agt. Johnson* (1 *Caldwell*, 626), the doctrine was applied to support a marriage entered into between parties competent to enter into the marriage relation, but the distinction that no legal disability existed, is recognized in this case, I think, upon principle and authority that the evidence of the former marriage was competent, and it being established is a defense to the action.

Can affirmative relief be granted, and the *status* of the parties be determined in this action? The Code (*old, sec.* 150; *new, sec.* 501) provides that: "A cause of action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, may be the subject of affirmative relief in favor of a defendant." Under this and the preceding and the subsequent sections, it has been held (and very recently in the third department), that in an action for divorce *a vinculo* a defendant may have affirmative relief (*J. W. B. agt. F. D. B.*, 11 *N. Y. Legal Obs.*, 350; *Anonymous*, 17

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Abb., 48; *Leslie* agt. *Leslie*, 11 *Abb.* [*N. S.*], 311; *Fullmer* agt. *Fullmer*, 6 *N. Y. Weekly Digest*, 22-42). Opposed to these is the case of *R. F. H.* agt. *S. H.* (40 *Barb.*, 9), in which *JOHNSON, J.*, dissented.

The right of affirmative relief does not depend upon the solution of the much controverted question, whether the duties and obligations imposed by marriage arise out of a continuing contract, or out of the relation of husband and wife, which some writers maintain merges the contract into a higher *status*.

The subject of the plaintiff's action is the alleged marriage relation between the parties, and a violation of the duties imposed by it.

The defense arises out of the alleged relation and is closely connected with the subject of the plaintiff's action.

A decree cannot be framed without containing a conclusion that the marriage between the parties is a nullity, and a judgment so declaring it, logically and necessarily follows. It has been held that if a marriage be adjudged void, alimony cannot be granted (2 *Wait's Actions and Defenses*, 604, and cases there cited; 2 *Bishop on Marriage and Divorce* [5th ed.], sec. 376, and cases there cited). The plaintiff has a right of action for the recovery of any damages sustained by reason of the defendant's conduct (*Blosom* agt. *Barret*, 37 *N. Y.*, 434), which is inconsistent with a right to alimony. She is not entitled to both.

In matrimonial actions, upon the coming in of the referee's report if the cause has been imperfectly tried, or competent evidence excluded, a new trial may be ordered. But if no necessity for a new trial appears, the court should render a judgment upon the evidence and report, confirming, overruling or modifying the conclusions of the referee (*Code*, sec. 1229, rule 83; 3 *Wait's Pr.*, 388; *Block v. Rider*, 47 *How. Pr.*, 90).

In 1860 the plaintiff received a transfer of the defendant's property. She has lain by for sixteen years without seeking

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a decree of nullity. By an order she has received \$100 towards the expenses of this action, and five dollars per week since May 29, 1876, and she is not entitled to further costs. The defendant's conduct does not entitle him to costs.

N. Y. MARINE COURT.

CALVIN E. WOOLWORTH *et al.* agt. MARY A. TAYLOR.

Execution where real property has been attached — what the command to the sheriff should require — Execution and sheriff's certificates of sale, if incorrect, may be amended in accordance with notice of sale — Code of Civil Procedure, sections 649, 708, 1369.

In issuing an execution in a case where real property has been attached, the command to the sheriff should, among other things, require him to satisfy the judgment out of the real property belonging to the judgment debtor "on the day when the attachment was levied thereon," and on the day when the judgment was so docketed.

In this respect sections 649, 708 (*sub.* 2) and 1369 of the Code of Civil Procedure are all to have operation in harmony.

Where the notice of sale is correct as to date of the attachment lien, the execution and certificates of sale made thereon may, if inaccurate, be amended, *nunc pro tunc*, to conform to the fact.

Special Term, September, 1881.

MOTION by purchaser to compel the sheriff to amend certificate of sale, and for other relief, &c.

Smith & Bowman, for petitioner.

Knox & McLean, for sheriff.

MCADAM, J. — The petition shows that the real estate described in the certificates of sale was, on the 22d day of July, 1880, duly levied upon by the sheriff, under the warrant of

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attachment issued herein on that day. This levy created a lien upon such property (*Code of Civil Pro.*, sec. 649), which was enforceable by sale under the execution subsequently issued upon the judgment (*Code of Civil Pro.*, sec. 708, sub. 2). The notice of sale refers to the date of such lien (July 22, 1880), and offers for sale "all the right, title and interest which the judgment debtor had in said property on that day," and this is the title which the petitioner purchased.

The sheriff's certificates purport to convey the right, title and interest which the judgment debtor had in the property "on the 26th of July, 1880," the day on which the judgment was docketed. This is incorrect, because it is not in accordance with the notice of sale. The certificates must, therefore, be amended so as to conform to the fact. The language of the command in the execution probably led to the error. By this the sheriff is, among other things, directed to satisfy the judgment "out of the real property in (his) county belonging to such judgment debtor on the day when the judgment was so docketed." It should have read "out of the real property in (his) county belonging to such judgment debtor, on the 22d day of July, 1880, when the attachment issued herein was levied thereon, and on the day when the judgment was so docketed." The execution is the authority for the sale, and it ought to be sufficiently comprehensive to embrace every interest intended to be sold. The omission may be supplied, however, by amendment *nunc pro tunc*, under the prayer for other relief (*Williams agt. Rogers*, 5 *Johns.*, 163; *Same agt. Hogeboom*, 22 *Wend.*, 648; *Boyd agt. Vanderkemp*, 1 *Barb. Ch.*, 273; *Holmes agt. Williams*, 3 *Cai.*, 98; *S. C., Col. & Cai. Cases*, 449; *Code of Civil Pro.*, sec. 721). The execution as directed to be amended will intelligently comprehend the lien created by the levy of the attachment, as well as that created by the docketing of the judgment. In this respect sections 649, 708 (sub. 2) and 1369 of the Code of Civil Procedure are all to have operation in harmony (see *Ansonia Brass and Copper Co. agt. N. Y. Lamp Chimney Co.*, 53

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N. Y., 125). Thus construed and practically acted upon, the direction to the sheriff becomes intelligible, and his duty is made clear. The amendment of the execution is first in order, and the other follows as of course.

So ordered.

SUPREME COURT.

LOUIS FLEISCHMANN agt. FREDERICK SCHUCKMANN.

Trade-mark — "Vienna bread" — injunction — right to use of word as a trade-mark.

The plaintiff, who first applied the word "Vienna" to baked bread and other articles, having been engaged in the manufacture in the city of New York of an article known as "Vienna bread," and which he has for many years past sold with a label thereon containing the words "Vienna Model Bakery," can maintain an action restraining the use by other parties of a label in imitation of his own, and in particular from applying the "Vienna" to baked articles.

Special Term, August, 1881.

ACTION for a perpetual injunction restraining the use by defendant of a trade-mark.

Fraser & Minor, for plaintiff.

C. Spiro, for defendant.

VAN VORST, J.— This is an action brought by the plaintiff to restrain the use of his trade-mark by the defendant. The plaintiff is a manufacturer in the city of New York of an article known as "Vienna bread," and which he has for many years past sold with a label thereon containing these words: "Fleischmann, Vienna Model Bakery, Broadway and Tenth street, New York. Patent applied for." Since the plaintiff introduced his article, and after it had gone into general use,

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the defendant commenced to manufacture and has continued to sell bread in loaves of a form similar to those of plaintiff, with a label thereon containing the words: "Schuckmann's Genuine Vienna Bakery, 154 East fifty-fourth street, New York."

It is the use of this label by defendant which the plaintiff seeks to enjoin. The rights of the parties respectively will be best disposed of by a consideration, first, of the facts as they are disclosed by the evidence, and when they are ascertained there will be but little difficulty in applying the principles, legal and equitable, which the facts call for.

At the centennial exhibition, in 1876, Gaff, Fleischmann & Co., under the management of the plaintiff, first applied the word "Vienna" to baked bread and other articles. Upon the termination of that exhibition, plaintiff, who is by birth an Austrian, having purchased from the manufacturer, Fleischmann, the exclusive right to use the word "Vienna," in connection with baked articles, commenced on his own account a manufactory of bread on the corner of Broadway and Tenth street. To bring his bread and other articles manufactured by him from flour into notice he expended a considerable sum of money. He brought bakers from Vienna and procured his flour from the best mills. He advertised his products and employed agents. The defendant was himself at one time an agent of the plaintiff.

In 1878 he employed a lithographer to design an appropriate label to be attached to each loaf of bread, and the label upon which the words first above given are printed was produced. This label the plaintiff has ever since used, and his bread is known in the market by the label. Bread made in Vienna is favorably known, but it is not sold there under a distinctive name as such, nor is the form of loaf adopted by plaintiff in use there.

Plaintiff also manufactures an article called by him "American bread." Both kinds are, however, made from the same quality of flour, but the way in which the flour is turned into dough and afterward into bread differs.

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The "Vienna bread" differs from other kinds manufactured by plaintiff, and purchasers know it by its external form and its label, and upon eating it they know its distinctive quality.

The plaintiff's label was intended by the lithographer, and was produced by him, as an original design. The impression on the paper is panel-shaped, corners curved inwardly forming a part of a black line border having continued perforations beyond the border, to indicate the edge, so as to be readily separated for use. The label is an inch and one-quarter in length and one-half inch wide. The paper used is white and the impression is in black ink.

The label adopted by the defendant is in size, form, color of paper and the impression thereon, with border and perforations, in all respects similar to the plaintiff's. The character or family of letters in which the printing is done is exactly like plaintiff's. The designer of the plaintiff's label testified that it was a duplicate of the one originally prepared for the plaintiff's use, and that the imitation of the plaintiff's label was exact.

The difference in the words printed on the two labels appears above.

The intention of the defendant to imitate the plaintiff's label and the success of his effort is apparent. Purchasers desiring Vienna bread of the plaintiff's manufacture, and not careful closely to examine the words on the defendant's label, could readily be deceived, as the defendant has adopted a form of loaf similar to the plaintiff's. In purchasing articles of so common use as bread, labels are not expected to be critically examined, and persons who cannot read, as well as those who do, are obliged to buy. The deception is thus readily accomplished.

Courts of equity have uniformly condemned the imitation of labels and other distinctive marks by which a manufacturer has chosen to distinguish his goods, when it is done for the purpose of deceiving the public and advancing his own fortune by one who would appropriate to himself the advant-

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ages secured through the successful enterprise and diligence of another. It is needless to cite authorities in support of a principle so consonant with reason and natural justice.

It does not at all take away from the force of this principle, which is applicable to the case now under consideration, that no complaint is made of the quality of the defendant's bread. If the bread sold by the defendant was bad it would add to the injury. But he is enabled by his imitation to sell his bread as the plaintiff's, and that diminishes the plaintiff's business and the gains to which he is justly entitled by priority in the introduction here of bread called by him Vienna bread, and in the use of a label first designed by him with appropriate marks and words to designate his article. This conclusions condemn the general practice of the defendant in so far as his label is an imitation of plaintiff's. It requires no argument to show the defendant's intention. His design is self-evident. Men are supposed to intend the consequences of their actions. It is, however, suggested by defendant's counsel that the plaintiff can have no exclusive right to the use of the word "Vienna," the name of the capital of Austria, as a trade-mark. That suggestion, under the facts of the case, I cannot adopt. The plaintiff and his assignor were the first to use it here or elsewhere to distinguish a manufacture of bread. As a mark for bread it is purely arbitrary, and it is in no manner descriptive, either of the ingredients or quality of the article.

The plaintiff, an Austrian, from Vienna, residing and manufacturing bread in this country, has clearly a right to call it, by way of distinction, "Vienna bread." By the use of the word "Vienna" in that connection no deception is practiced, because the place of its manufacture is given and it is known that bread cannot be imported from abroad for use here. The plaintiff has the same right to do that as the makers of shirt collars had to call their article "Bismark collars" (*Messerole* agt. *Tynberg*, 4 *Abb.* [*N. S.*], 410). I presume that a baker in Paris or Vienna could manufacture bread there and intro-

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duce it under the name of "New York bread" and use it arbitrarily, and be protected under the laws of their country if he was first to apply "New York" in such connection.

I do not think it important to refer in detail to the cases cited by the counsel on the bearing of the case.

That the plaintiff is entitled to protection in the use of his label and to the exclusive use of the word "Vienna" in connection with the manufacture and sale of baked articles, appears to me so clear that a denial thereof would be contrary to justice (*McAndrew* agt. *Bassett*, 10 *Jurist* [*N. S.*], 550; *Newman* agt. *Alvord*, 51, 189).

It is objected that the plaintiff's label contains a misstatement with respect to a patent being "applied for." I find no evidence of any untruthfulness in this regard. He did apply for a patent but was unsuccessful, the word "Vienna" having already been secured by letters to his predecessor. Some of the old labels were used afterwards, but in the later labels, these words have been dropped.

There should be judgment for the plaintiff restraining the defendant from using his label in imitation of the plaintiff's, and in particular from applying the word "Vienna" to baked articles.

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SUPREME COURT.

ANN SEIFERT agt. MICHAEL SCHILLNER.

Costs — of term not to be awarded to plaintiff against defendant when defendant has noticed case for trial, but does not move it when reached.

The court will not compel a party who has himself noticed a case for trial, but for some reason does not move it, to pay costs to another party who has not put himself in the same position. By noticing a case he keeps for himself control of it at the circuit.

If the plaintiff does not move after he has brought the defendant into court, he may be punished by a motion, under the Code, to dismiss the case for want of prosecution. But no similar remedy is given to the plaintiff where the defendant, having noticed the case for trial, does not move it when the case is reached upon the calendar.

Lewis Special Term, June, 1881.

MOTION to compel defendant to pay plaintiff the costs of the May term of the Oneida circuit, 1881.

The following facts appeared upon the hearing:

The cause was at issue and was noticed for trial by the defendant for the May term of the Oneida circuit. The plaintiff omitted to notice it because of the serious illness of the plaintiff. About one week before the court convened the defendant's attorney stated to plaintiff's attorney that plaintiff's physician had informed him that "she was ill, and that he would not be surprised if she did not live many months." Defendant's attorney further stated that he should try the case at the approaching term. By the ninth of May plaintiff had so far recovered as to attend the term. Defendant placed the cause on the day calendar for the tenth, and on the morning of the tenth plaintiff's attorney called upon defendant's attorney for the purpose of making some arrangement with him (the attorneys for plaintiff and defendant residing at Rome, and the court being in session at Utica), when defendant's attorney informed him that "he would not

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be responsible for a default; that when the case was reached it would be moved." Plaintiff's attorney, in company with plaintiff, who was very feeble, and her witnesses, then attended the term at Utica daily, until the twenty-fourth of June, when the case was reached and passed, defendant making no appearance.

After plaintiff's attorney had been in attendance upon the term for four days, defendant's counsel asked plaintiff's attorney if he was ready for trial, and stated that he did not think defendant's attorney intended to try the case; that he told him if plaintiff's attorney was not ready, to move it, otherwise not. Defendant's attorney also stated to another attorney that his readiness to try the case would depend upon the readiness of plaintiff's attorney; that plaintiff had not noticed it, and could not move it, and he should default him if he was not ready. The attorney for the defendant did not deny any of the above statements, but claimed that he intended to try the case, but was prevented by other engagements.

Plaintiff received no notice that defendant did not intend to try the case except as above.

Oswald Prentiss Backus, for motion. Defendant should have countermanded his notice of trial if he did not intend to try the case; not having done so he is chargeable with the costs of the term (3 *Wait's Supreme Court Pr.*, 37). Under the practice as it existed prior to the Code, the plaintiff only could give notice of trial in personal actions. If he did so, and brought defendant and his witnesses into court, and then failed to try the case, he was obliged to pay the costs of the term (1 *Dunlap's Pr.*, 553, 585). In actions of replevin, writs of prohibition and writs of error, where error in fact was assigned as the ground of error, and where a feigned issue was awarded from chancery, either party might notice for trial as under the Code, and if the defendant gave notice of trial, and after such notice failed to proceed or countermand his notice in due time, he was liable to pay the plaintiff the

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costs of the term (1 *Dunlap's Pr.*, 553; *Townsend* agt. *Cowen*, 19 *Wend.*, 639; 1 *Sellon's Pr.*, 413; 2 *Str.*, 797; 2 *Saund.*, 336; 2 *Archbold's Pr.*, 242; *Potter* agt. *Lewis*, 18 *Wend.*, 159, *note*; 9 *Wend.*, 497; *Dauchy* agt. *Allen*, 3 *How. Pr.*, 212; *Keys* agt. *Beardsley*, 18 *Johns.*, 135).

E. L. Stevens, opposed, argued that it was not the practice under the Code to grant motions of this character, and no decisions since the Code could be found authorizing it.

CHURCHILL, *J.* — I think I shall be obliged to deny this motion. It is entirely new in the practice, which has covered the whole period of the Code, for the plaintiff to make a motion of this kind. Litigation is war. Parties occupy, as the courts recognize, hostile positions; each man is expected to put himself into position to protect his rights. The court will see that the parties do not exercise any fraud, either upon the other, but will not compel a party who has himself noticed a case for trial, but for some reason does not move it, to pay costs to another party who has not put himself in the same position. By noticing a case he keeps for himself control of it at the circuit. The fact that neither party has been able to find any cases in the numerous volumes of reports of practice which have appeared since the adoption of the Code, would seem to be sufficient reason to presume that it was not the practice in this state.

If the plaintiff does not move after he has brought the defendant into court, he may be punished by a motion under the Code to dismiss the case for want of prosecution. But no similar remedy is given by the rules of practice, or by the Code, or by the acknowledged practice of the court, to the plaintiff, where the defendant having noticed the case for trial does not move it when the case is reached upon the calendar. It might be very proper—I think it would be—that the rules of the court regulating the day calendar should compel the party who puts a cause upon the day calendar to move it

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when reached, whether noticed by the other side or not. But in the absence of any rule to that effect, I know of no power to grant the motion. It is a novel question and I will deny it, without costs.

SUPREME COURT.

JAMES HULL *et al.* agt. LILLIAN HULL, THE NEW YORK LIFE INSURANCE AND TRUST COMPANY *et al.*

Insurance (Life) — policy issued on life of husband for use of wife, and if she died to her children for their use, who entitled to share under the policy.

Where a life insurance policy was issued upon the life of the husband for the use of his wife, and if she died before him the amount of insurance was payable “to her children for their use, or to their guardian if under age,” and the wife died before her husband:

Held, that a grand child of the insured, the issue of one of the children who died before his mother, is entitled to a share under the policy.

Special Term, September, 1881.

THE New York Life Insurance and Trust Company on February 21, 1848, issued a policy for \$5,000 upon the life of James S. Hull, for the sole use of his wife, Rachel Hull, and in the event of her death before her husband the amount of such insurance was made payable “to her children for their use, or to their guardian if under age.” Mrs. Hull died February 20, 1877, leaving two children — the plaintiffs herein — and three grandchildren, the issue of children who died before their mother. James S. Hull died October 2, 1877, and objection is now made that Lillian Hull, one of the grandchildren, is not entitled to any benefit under the policy on the ground that it belongs to the children of the assured.

William B. Tullis and William B. Hornblower, for plaintiffs.

F. F. Vanderveer, for defendant Lillian Hull.

Hull *et al.* agt. Hull *et al.*

LARREMORE, *J.*—The policy was issued for the sole use and benefit of Rachel Hull, and in case of her death before her husband the amount of insurance was made payable to her children for their use, or to their guardian if under age.

It is contended that Lillian Hull, a grandchild of the assured, is not entitled to a distributive share of the proceeds of the policy, which, by its terms, are given to her children only as a class of persons; that the father of Lillian had only a contingent interest in such proceeds, and that there is by law no representation by descent as to personal property.

We are not left to the stringent rules of the common law as to contracts which have been the subject of adjudication and legislative enactment.

By the policy in question an irrevocable trust was created in behalf of Mrs. Hull and her children (*Barry v. Equitable Life Assurance Society*, 59 *N. Y.*, 587). The same principles should be applied in its construction which govern testamentary disposition of property. The intention is clear that in the event of Mrs. Hull's death before the falling in of the policy, it was to enure to the benefit of her children generally. There is no limitation to class or condition (*See Teed v. Morton*, 60 *N. Y.*, 506; *Low v. Harmony*, 72 *N. Y.*, 408), nor to living or surviving children. Evidently this phraseology was intended to include the children of a deceased child (*Murphy v. Harvey*, 4 *Edw. Ch.*, 131; *Campbell v. Rawson*, 18 *N. Y.*, 412; *Prowitt v. Rodman*, 37 *N. Y.*, 42; *Bowne v. Underhill*, 4 *Hun*, 130; *Continental Life Insurance Co. v. Palmer*, 42 *Conn.*, —).

The rights of Lillian in the policy were contingent during the life of her grandmother; but upon the death of the insured the beneficial interest thereunder vested in the children and descendants of children of the assured who then had present capacity to take. This distinguishes the case at bar from the class of cases where the question of an immediate gift and possession was involved.

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Having reached this conclusion, it is unnecessary to consider the other branches of the case.

The defendant Lillian Hull is entitled to judgment in her favor for the one-fourth part of the insurance moneys, with costs to be paid out of the general fund.

SUPREME COURT.

WINIFRED NOLAN agt. MICHAEL A. SKELLY and others.

Pleading — Answer — Partition — When reference will be ordered — Code of Civil Procedure, sections 969, 1544, 1013.

An answer in a partition suit which alleges that the defendant, one of the tenants in common, owns the lot adjoining one of the lots sought to be partitioned ; that their father, from whom estate comes in his lifetime, caused to be erected a two story and basement building with stone foundation, partly on defendant's own lot and one of the lots involved in such suit, without authority so far as defendants' lot was concerned, and asking to be awarded full possession of his lot and for \$500 damages is a nullity, and the usual order of reference as upon default is proper.

Third Department, General Term, September, 1881.

Before LEARNED, P. J., BOARDMAN and BOCKES, JJ.

ACTION to partition real estate located in the city of Albany. The plaintiff and defendants own it as tenants in common. The complaint was in the usual form. Michael A. Skelly one of the tenants in common served an answer as follows : " The defendant, Michael Skelly, whose full name is Michael A. Skelly, separately answering the complaint served herein, avers that he denies that the rights, shares and interests of the parties hereto are correctly alleged in said complaint, and he further avers that he is the owner in fee of the lot and prem-

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ises adjoining on the west the premises secondly described in the said complaint; that defendants said lot is about thirty-seven feet two inches in width fronting on Van Woert street, and about 187 feet in depth; that prior to the death of Andrew Skelly in said complaint mentioned, said Andrew Skelly caused to be erected and constructed a two-story dwelling with stone and brick foundation and basement, locating and constructing the same in part upon the premises secondly described in said complaint, and also upon a portion of the defendant's own lot above mentioned; that a description of the portion of the defendant's said lot, occupied by said dwelling, is as follows:

(Here follows description.)

"That said building still occupies the said premises; that the erection and construction aforesaid upon the defendant's lot was without authority, and the said trespass and illegal possession of said defendant's premises still continues to the great damage of this defendant. Wherefore this defendant prays that judgment may be entered awarding to him the full possession of his own premises above described, with \$500 damages, or that he obtain such other or further relief as to the court may seem meet."

After service of this answer the cause was noticed for trial by both parties and was for three terms on the Albany circuit calendar. The plaintiff moved at special term for an order referring it to some referee, to be appointed by the court, to take proof of the title and interest of all the parties hereto in and to the premises described in the complaint, and to perform all other duties usually required of a referee in such cases, and to hear and determine the issues, if any, raised by the pleadings herein, and to report herein to the court as he shall be required in and by said order, and for such other and further relief as to the court shall seem just, and for the costs of this motion.

The court granted the usual order of reference as upon a failure to answer, and the defendant, Michael A. Skelly, brought this appeal.

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Lucien Tuffs, Jr., for appellant.

I. In partition cases, by section 1544 of the Code, an issue of fact joined in the action is triable by a jury (*Cassidy* agt. *Wallace*, 61 *How. Pr.*, 240; *Barnes* agt. *West*, 16 *Hun*, 70).

II. The matter stated in the answer served involved the rights of all the tenants in common. Portions of one building erected by the common ancestor is located upon the individual lot of defendant Michael Skelly, and a lot now owned by the cotenants. The house is indivisible. How can the property be partitioned or sold? If sold the purchaser would be buying a law suit. Equity, therefore, demands that the question be settled in this action.

1. In partition cases the defendant may plead in his answer as in other actions (*Reed* agt. *Child*, 4 *How. Pr.*, 125; *S. C.*, 2 *Code R.*, 69). 2. Where a suit for partition is in a court of equity, or in a court authorized to proceed with powers as ample as those exercised by courts of equity, it may be employed to adjust all the equities existing between the parties and arising out of their relation to the property to be divided. "He who seeks equity must do equity." Hence whoever, by a suit for partition, invokes the jurisdiction of a court of equity in his behalf thereby submits himself to the same jurisdiction and conceives its authority to compel him to deal equitably with his cotenants. As the equities of the cotenants may arise from a great variety of circumstances, it follows that the assertion of these equities necessarily introduces into partition suits a great variety of issues, and calls for various allegations in the respective complaints and answers which would not be required in an ordinary suit for partition not complicated by any special equities between the cotenants (*Freeman on Cotenancy and Partition*, sec. 508). 3. In a partition case the court held as follows: "As the court has jurisdiction of the subject-matter and the parties in interest, it is in accordance with a well established rule that it should do complete justice between the parties by disposing of all

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questions between them in relation to the land and its use. In the language of judge STORY, 'the jurisdiction having once rightfully attached, it shall be made effectual for the purpose of complete relief' (*Story's Eq. Jur.*, sec. 64, k.; *Scott agt. Guernsey*, 60 *Barb.*, 178; *affirmed in* 48 *N. Y.*, 106).

4. The claim made in the answer herein must surely be held to relate to the subject of the action and is a claim against his cotenants, and therefore was properly plead within the case of *The Glen and Hall Manufacturing Company agt. Hall* (61 *N. Y.*, 226). This case was an action to restrain the use of a trade-mark, and the defendants answered, claiming the ownership of the trade-mark and asking judgment against plaintiff, including a claim for an injunction. *Held*, that the defense being sustained by proof was a good one, and a permanent injunction was granted.

5. It was suggested at special term that the remedy of the appellant herein was not to interpose the matters in an answer, but he should commence an ejectment suit against his cotenants to recover possession of his own land and obtain an injunction in the ejectment suit to stay the present action. It is submitted that such a course would not be authorized or justified. The policy of our system of pleading is to avoid multiplicity of suits and give full relief in one action.

6. In *Carpenter agt. Keating* (10 *Abb. [N. S.]*, 223) it was held: "As a defendant can now, as a general rule, interpose any defense he may have, whether legal or equitable, and thus obtain by answer, motion or otherwise, all the relief in the original suit to which he would be entitled if he brought a separate action, it is neither necessary nor allowable to bring an action, nor will an injunction be granted merely for the purpose of restraining the proceedings in another action, both being in the same court" (*See, also, Shiff agt. Freeman*, 11 *Rep.*, 63).

F. S. Black, for respondent.

I. The order is not appealable (*Tallman agt. Hinman*, 10 *How.*, 89; *Field agt. Stewart*, 8 *Abb. [N. S.]*, 193; *Bryan*

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agt. *Brennon*, 7 *How.*, 359; *Nosdell* agt. *Root*, 1 *Hilt.*, 173; *Kennedy* agt. *Shilton*, 1 *id.*, 546).

II. But if the order is appealable it should be affirmed, as the answer raises no issue. 1. The words "avers that he denies," is not a sufficient form of denial (*People* agt. *Christopher*, 4 *Hun*, 805; *Arthur* agt. *Brooks*, 14 *Barb.*, 533; *Blake* agt. *Eldred*, 18 *How.*, 240). 2. The words "denies that the rights, shares, &c., are correctly alleged in the complaint," is not the direct, unequivocal denial which the law requires (*Wood* agt. *Whiting*, 21 *Barb.*, 190; *West* agt. *Am. Ex. Bk.*, 44 *id.*, 175; *Oechs* agt. *Cook*, 3 *Duer*, 161).

III. If an issue is raised it was properly referred. This is an equity action and is therefore triable by the court (*Sec.* 969, *Code Civil Pro.*; *Thurber* agt. *Chambers*, 4 *Hun*, 721 [727]; *McCarty* agt. *Edwards*, 24 *How.*, 236 [240]; *McMahon* agt. *Allen*, 10 *id.*, 384; *Cheeseborough* agt. *House*, 5 *Duer*, 125). And being triable by the court it is referable in the court's discretion (*Sec.* 1013, *Code Civil Pro.*; *McMahon* agt. *Allen*, 10 *How.*, 384; *Colie* agt. *Tift*, 47 *N. Y.*, 119 [121]; *McCarty* agt. *Edwards*, 24 *How.*, 236 [240]; *Carr* agt. *Wehran*, 2 *Rob.*, 663). A jury trial is not a matter of right in this class of cases, but is in the discretion of the court (*Church* agt. *Freeman*, 16 *How.*, 294; *McCarty* agt. *Edwards*, 24 *id.*, 236; *O'Brien* agt. *Bowes*, 4 *Bos.*, 657; *Wilson* agt. *Forsyth*, 16 *How.*, 448; *N. Y. and N. H. R. R.* agt. *Schuyler*, 34 *N. Y.*, 30 [46]; *Rexford* agt. *Marquis*, 7 *Lans.*, 249 [263]; *Knickerbocker Life Ins. Co.* agt. *Nelson*, 8 *Hun*, 21).

BOARDMAN, J.—The answer of the defendant Skelly is a nullity. It does not deny generally the complaint, or specifically any fact therein contained. It alleges no new matter by way of affirmative defense. It says, in effect, that the complaint does not state the shares and interests of the parties correctly. That raises no issue. It merely expresses the opinion of the party answering. It states no fact. It indicates no error in any statement made in the complaint. It

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calls for no other or further proof than would be required by law and *by* the practice of the court if no answer had been interposed. We conclude, therefore, the answer was a nullity, and demanded no recognition; nor was the ownership of the adjoining premises by the defendant, who attempted to answer any trespass thereof, of the slightest consequence in this action for partition. It was not and could not be involved in the disposition to be made of the rights of the parties to this action.

The reference is a prompt and usual mode of determining the rights of the parties in such action. No reason exists why it should not be satisfactory.

We are satisfied the order of reference granted in this case will serve the best interests of the parties, and promote an early determination of their rights without wrong to any one. We are also satisfied the plaintiff was entitled to such order as the action stood when it was granted.

The order is therefore affirmed, with ten dollars costs and disbursements for printing.

LEARNED, P. J., and BOCKES, J., concurred.

SUPREME COURT.

FANNY D. WYLIE agt. GUSTAVUS SPEYER and others.

Stolen coupons — Title of true owner — Bona fide purchaser — Where the action is for equitable relief only, the judgment must be for equitable and not legal redress — Foreign law — Conflict in law.

Where coupons of railroad bonds, which had been stolen in this country, were purchased after maturity in Frankfort-on-the-Main, and sent here for collection, and this action was brought by plaintiff, who owned the coupons at the time they were stolen, to restrain payment to the purchasers by the railroad company:

Held, that under the law of this state, though there is nothing to impeach the good faith of the purchasers, that transaction, the coupons being over due, cannot avail to invest them with a title without the assent of

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the plaintiff, the true owner, from whom they were stolen; and her title to the coupons is unaffected by such purchase. The law and usage prevailing at Frankfort being in conflict with the law of New York upon this subject, the latter must prevail, the plaintiff and one of defendants being residents of New York, and the property itself, the subject of the action, being brought within this jurisdiction.

Special Term, August, 1881.

Holmes & Adams, for plaintiff.

Evarts, Southmayd & Choate, for defendant Bonn.

VAN VORST, J.—The plaintiff was the owner of six mortgage bonds of the Pacific Railroad Company of Missouri, of \$1,000 each, with coupons attached, representing the interest to fall due upon the bonds at intervals of six months, each coupon being for the sum of thirty dollars.

The bonds, with coupons annexed, were on deposit in the National Bank of Northampton, in the state of Massachusetts, for safe keeping. On the 28th day of January, 1876, the bank was entered by burglars, and a large amount of property was stolen therefrom, including the six bonds, with coupons, of the plaintiff.

Coupons, separated from the bonds, to the number of thirty-six, and all past due, were, on the 30th day of December, 1878, purchased on the public exchange, at Frankfort-on-the-Main, by the firm of Hazard Speyer Ellissen, of which firm the defendants Gustavus and George Speyer, and Ignace Shuster were members, and who severally resided at Frankfort-on-the-Main, where the business of the firm was conducted. The coupons were purchased in the regular course of business on the exchange from one Leopold Gompertz, a reputable merchant of Frankfort, and a member of the exchange, for the sum of 4,503 $\frac{60}{100}$ marks, at the rate of 4 $\frac{17}{100}$ marks per dollar, which was the full market value of the coupons.

The purchase was made honestly and in good faith, without notice or suspicion that the plaintiff, or any person other than

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the seller, Gompertz, claimed to be the owner or to have any title or claim in or to the coupons, or that the same had been at any time stolen from the true owner.

After having purchased the same, Hazard Speyer Ellissen transmitted the coupons to the defendants, composing the firm of Speyer & Co., doing business in the city of New York, for collection. The defendant Bonn, with the persons who form the European firm of Hazard Speyer Ellissen, constitute the partnership of Speyer & Co., doing business in New York.

The defendant Bonn, who alone answers the complaint, resides within the state of New York, and the plaintiff, at the time her bonds were stolen, was a citizen of the United States, and at the commencement of this action resided in the state of New York. Upon receipt of the coupons in the city of New York, Speyer & Co., caused the same to be presented for payment at the office of the railroad company, and were there informed that the plaintiff claimed to be the owner thereof, and had notified them that they had been stolen from her; but Speyer & Co., insisting, the railroad company received the coupons, which they have ever since retained, and gave to Speyer & Co., its check for \$1,080 gold, the amount thereof, upon the National Bank of New York, the check being payable to the order of Speyer & Co. The check was duly presented by Speyer & Co. for payment to the bank upon which it was drawn, but payment of the same was refused and the check has never been paid in whole or in part, and is still held by Speyer & Co.

The payment of the check by the bank was stopped by an injunction obtained in this action, the bank as well as the railroad company being made parties defendant.

Upon this summary of the principal facts it seems quite clear, under the law of this state, that the plaintiff's title to the coupons was wholly unaffected by the purchase of them made by Hazard Speyer Ellissen, in Frankfort.

There is nothing to impeach the good faith or honesty of

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the purchasers, but that transaction, the coupons being over due, cannot avail to invest them with a title without the assent of the plaintiff, the true owner, from whom they were stolen.

After their maturity, the coupons lost the attribute of negotiability, and they dropped into the category of ordinary property, to which title does not pass by mere delivery.

The following cases, among many, illustrate this principle: *Vermilyea* agt. *Adams Express Company* (21 Wall, 138); *Evertson* agt. *Bank of New York* (66 N. Y., 14). I do not understand the learned counsel for the defendants to claim the law to be otherwise.

But he urges that the taker of stolen coupons, in good faith after maturity, may get a good title, as against the original owner, provided that some person in the chain of title between himself and the true owner had obtained a good title, which has been transmitted to the claimant. In such contention I think the defendants' counsel is entirely right (*Grand Rapids and Indiana R. R. Co.* agt. *Sanders*, 54 How. P. R., 214, 219, and cases there cited). But the burden is upon the defendants to prove the fact out of which such legal claim arises.

The plaintiff's title is made out by showing the fact of original ownership and that the property had been stolen. If they reached the hands of a *bona fide* purchaser before maturity, through whom the defendants claim, they must establish it.

Under the evidence the defendants took title after maturity, subject to all the rights and equities of the true owner (*Byles on Bills*, sec. 166; *Bank* agt. *Green*, 43 N. Y., 298; *Collins* agt. *Gilbert*, 4 Otto, 754). It is not proven when, from whom or for what consideration, or under what circumstances, Lagraves, alias North, from whom Gompertz purchased the coupons after they had matured, came into possession of them.

He did state, at the time he sold the coupons to Gompertz, that the bonds had been the property of an estate which had

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been for some years in litigation ! There is nothing to show that Lagraves had any better title than the robbers who committed the burglary.

It is also urged on the defendants' behalf that the law of the country in which the property was situated at the time of a sale is paramount, and absolutely determines the validity of the transfer and the title of the transferee. It has been clearly proven in the case that according to the laws of Frankfort, a purchaser of coupons, acting in good faith, for a valuable consideration, obtains a title thereto against all others, whether the purchase be made after or before they fell due. And the fact that the coupons had been stolen from the true owner would not affect the title of an honest buyer. The law and usage prevailing at Frankfort is in conflict with the law of New York upon this subject.

But the rights of these parties must be determined by the law as it obtains in the forum in which this action is brought. A resident in New York, plaintiff, properly sought redress through its legal tribunals. One of the defendants resided in this state, and the property itself, the subject of the action, had been voluntarily brought within this jurisdiction.

A recognition of what is due to other jurisdictions, through comity, cannot call upon this court, under the facts of this case, by preferring the foreign, to disregard our own law to the prejudice of the plaintiff. If any doubt has heretofore existed upon this general subject, I consider it to be dispelled by *Edgerly* agt. *Bush* (81 *N. Y.*, 199). That case furnishes a rule applicable to contentions of this character, and holds that in a case like the present one, the law of the plaintiff's domicile must determine the contest.

Judgment must, therefore, be determined in favor of the plaintiff.

The question which next arises is as to the form of the judgment. Annexed to the findings of fact submitted on the plaintiff's behalf are conclusions of law, in which it is asked

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that it be adjudged that plaintiff was the owner of the coupons on the 17th day of May, 1879, and was entitled to the possession of same. To that there can be no objection. But this is followed by a demand for judgment for \$1,080, with interest.

In determining whether the plaintiff is entitled to a money judgment against these defendants, the form of the action, as shown by the complaint, must be considered. The action was addressed to the equitable cognizance of the court, an injunction was obtained and a receivership was asked.

Following the allegations of the complaint the relief asked was equitable and *in rem*. That is to say, that the check given by the railroad company might be canceled; that the plaintiff might have judgment against the defendant the railroad company for the delivery to her of the coupons or the proceeds of same—to wit, the sum of \$1,080; that the defendants Speyer & Co. be enjoined, pending this action, from presenting the check for payment or demanding payment of the same, or from disposing of the check or its proceeds.

The action was tried as one for equitable relief without a jury at special term. The relief therefore must be equitable only. The action cannot be changed from one of that character into one for legal redress arising out of an alleged conversion.

It is true that the specific equitable relief asked in the complaint is followed by the general prayer for such other relief as to the court shall seem proper. But that must be construed to mean relief of a character kindred to that specifically asked, and which, in an action of this nature, must also be equitable and efficient to secure that which has been adjudged, and to such equitable relief only the plaintiff should be limited.

The plaintiff's counsel must therefore prepare conclusions of law substantially in accord with the relief demanded in the complaint, and should anything further be wanted to render the judgment effective, it must be of the same nature.

Commissioners of Public Charities and Correction agt. Casiatir.

N. Y. MARINE COURT.

THE BOARD OF COMMISSIONERS OF PUBLIC CHARITIES AND
CORRECTION OF THE CITY OF NEW YORK agt. G. A.
CASIATIR.

*Security for costs — When required to be given — Code of Civil Procedure,
sections 3246-3271.*

Where the commissioners of charities and corrections of the city of New York, as overseers of the poor, bring a suit in the exercise of their powers, it is under the sanction of their oath of office, and every presumption of good faith attends the proceeding, and hence they are in such cases exempt from costs.

But where a volunteer impugns the acts of sworn officials, and brings actions in their names, founded upon an allegation of their neglect of official duty, he assumes the responsibility of costs, which under section 3246 of the Code of Civil Procedure may be awarded against him personally; and under the express provisions of section 3271 he may be required to give security for costs.

Special Term, September, 1881.

WILLIAM H. MUNDAY, as attorney for E. M. Rillings, commenced this action under section 30 of chapter 628 of the Laws of 1857, as amended, to recover the sum of fifty dollars, and charged that the plaintiff had, after notice to them that the defendant had violated the law, neglected or refused to sue for the penalty, and that thereby a right of action had accrued to said Rillings. The defendant asked that the plaintiffs, by said relator, be required to give security for costs.

Joseph Bellesheim, attorney for defendant, for motion. *A. C. Anderson*, of counsel.

W. H. Munday, for Rillings, opposed.

MCADAM, J.—The commissioners of charities and corrections, as overseers of the poor, are intrusted with an office that requires discretion, and a trust that is to be exercised for the public good. When they bring suit in the exercise of their

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powers, it is under the sanction of their oath of office, and every presumption of good faith attends the proceeding, and hence they are, in such cases, exempt from costs. But where a volunteer impugns the acts of sworn officials and brings actions in their names, founded on an allegation of their neglect of official duty, the most he can claim is that he is "a person authorized by statute to sue." He assumes the responsibility of costs which may be awarded against him personally (*Code of Civil Procedure, sec. 3246*), and under the express provisions of section 3271 he may be required to give security for costs (*See Board of Commissioners agt. Purdy, 36 Barb., 266*).

There is no hardship in this, for if the action is well founded he will have no costs to pay; but if it should prove to be ill-founded, then the unfortunate defendant, who has been harassed by an unwarranted act of a stranger, who sets the machinery of the law in motion against him, will have some hope of obtaining at least part of the expense to which he has been subjected. The motion to require security for costs will, therefore, be granted.

N. Y. COMMON PLEAS.

LOUIS AMSINCK and others, plaintiffs and respondents agt.
LEONARD S. NORTH, defendants and appellants.

Examination of party before trial — When appeal does not lie from an order denying a motion to vacate order for such examination — Discovery of books and papers — when to be ordered — Code of Civil Procedure, secs. 803, 804, 805, 806, 807, 808.

The plaintiffs, having obtained from one justice an order granting an examination of the defendants before trial, an appeal from an order by another justice denying a motion to vacate the first order is held not well taken, because the first order was conclusive until reversed or leave given to renew the application to vacate; and the fact that the order to show cause why the order for an examination should not be set aside,

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upon the return to which the order appealed from was made, was granted by the same justice who made the order for such examination, does not of itself amount to leave to renew.

The plaintiffs obtained an order for discovery upon a petition alleging upon information and belief that defendants had in their possession certain letters and bills of lading relating to the goods mentioned in the complaint, and books of account containing entries relating to them, and that said books and papers related to the merits of the action, and their inspection was necessary to prepare the case for trial.

Held, 1. That the possession by defendants of these books and papers, in the absence of denial by them, must be assumed; that if they exist, they would necessarily relate to the merits of the action, and that, therefore, a case is made out for a discovery, under section 803 of the Code.

2. The defendants' claim that no discovery can be ordered, except in the cases mentioned in rule 14 of the supreme court rules, is untenable, as, by the provisions of section 804 to 808 of the Code, the general rules of practice may enlarge section 803 and the following sections, but they have no power to restrict the operations of those sections.

General Term, June, 1881.

Before DALY, C. J., VAN BRUNT and BEACH, JJ.

Mr. Buel, for appellants.

Mr. Whitehead, for defendants.

PER CURIAM. — There are three appeals in this action : First, from the order of Mr. justice DALY, on the 18th of May, 1880, denying a motion to set aside a summons and complaint and order for examination of the defendants before trial herein; second, from the order of Mr. justice DALY, made on the first of June, 1880, denying a motion to vacate an order for discovery; and, third, from the order of Mr. justice VAN HOESEN, of the 30th of July, 1880, denying a motion to vacate and set aside an order granting an examination of the defendants before trial.

It is sufficient to say, as to the first appeal, so far as the same is an appeal from the order denying the motion to set aside the summons and complaint upon the ground that no

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specific persons are named as plaintiffs or defendants, that the said order was properly made, because any such objection to the summons and complaint had been waived by the answer of the defendants, and also by the delay of the defendants in moving therefor.

As to so much of said order as appears to have denied a motion to set aside the order for examination of the defendants before trial, it was properly denied, because it appears by an order dated April 5, 1880, that a similar motion had been made before judge LARREMORE and denied, and no appeal was ever taken from said order and no leave to renew such motion was ever given.

For the same reason the third appeal above mentioned — namely, that from the order of the thirtieth of July — is not well taken. The order of Mr. justice LARREMORE, of the 2d of April, 1880, was conclusive upon the parties to this action as to the order for examination, until it had been reversed or some leave to renew the application to vacate the order had been granted.

It is urged upon the appeal from the order denying the motion to vacate the order of discovery, that the facts presented by the papers in this action do not bring the case within the rules authorizing the discovery, and the claim is made that no discovery can be ordered, except in the cases mentioned in subdivisions 1 and 2 of rule 14 of the supreme court rules. By section 803 of the Code, it is provided that a court of record has power to compel a party to an action pending therein to produce and discover, &c., any book, document or other paper in his possession or under his control, relating to the merits of the action or of the defense therein. Section 804 provides that the general rules of practice must prescribe the cases in which discovery or inspection may be compelled, and the proceedings for that purpose, where the same are not prescribed in this act. The Code presents, as has been above stated, certain cases in which a discovery may be had — namely, where the book, document or other paper

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desired to be discovered relates to the merits of the action or of the defense therein. Sections 805, 806, 807 and 808, prescribe the proceedings which are to be taken under section 803, and it is to be observed that section 804 simply authorizes that the general rules of practice must prescribe the cases and the proceedings where the same — namely, the cases and proceedings — are not prescribed in this act. In other words, the general rules of practice may enlarge section 803, and the other sections above named, but they have no power to restrict the operations of those sections.

It is claimed that the language of section 803 is so general that it leaves nothing, if the above construction is correct, for the general rules of practice to prescribe. If that interpretation is necessary, it will have to prevail, because the general rules of practice are expressly prohibited from operating upon those cases.

The enactment, in the supreme court rules, of subdivision 3 of the rule 14, is a mere recognition upon the part of the convention of judges that they had no right whatever to interfere with the provisions of the sections which we have mentioned. It therefore follows that, if the petition upon which the order for discovery was granted shows the jurisdictional facts, the order must be affirmed.

The petitioner in this case alleges upon information and belief that the defendants have in their possession one or more letters, and copies of one or more letters, bills of lading or receipts relating to the goods mentioned in the complaint in this action, also a bill of account of the goods, also books of account kept by the defendants' firm containing entries relating to the ordering, purchase and delivery of said goods. The petitioners also allege that said books and papers relate to the merits of this action and that the petitioners will be unable to prepare properly the case for trial without the discovery and inspection of those books and papers.

The possession by the defendants of these books and papers, in view of their failure to make any answer whatever to this

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application denying such possession, must be presumed, and such papers, if they do exist, would necessarily relate to the merits of the action.

Since the above was written our attention has been called to the point that the order to show cause why the order for an examination before trial should not be set aside upon the return of which the order appealed from was made, was granted by the same judge who made the order of April 15, 1880.

We do not think that this order of itself amounts to leave to renew. There should be some indication contained in the order to show cause that it was the intention of the court to give leave to renew the motion.

In this county orders to show cause have unfortunately apparently become so much a matter of course that it would be entirely unsafe to predicate any judicial action upon the fact that one had been granted.

Under these circumstances it would appear that the judge acquired jurisdiction to grant the order of discovery, and such order should not be interfered with upon appeal.

SUPREME COURT.

JACOB H. GUMBLE and another, executors of the last will and testament of GUSTAVE C. BRAUM, deceased, agt. CAROLINE M. PFLUGER and others.

Bequest to charitable uses — Discretion vested in executors as to choice of beneficiary — Parties.

The testator, in his will, directed his executors "to apply" a portion of his estate "to such charitable institutions, which are under Protestant management, as my said executors, or a majority of them who may act as such, may choose:"

Held (in this action to test the validity of this clause), that, though the question is one of difficulty, the bequest is valid, and should be enforced

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according to the directions of the testator; and the charitable institutions chosen by the executors from the class designated should be brought in as parties defendant (*Power agt. Cassidy*, 79 *N. Y.*, 327, *applied*).

Special Term, August, 1881.

William Bliss, for plaintiffs.

F. F. Marburry, for defendant.

VAN VORST, *J.* — By the eighteenth clause of his last will and testament, the testator, Gustave C. Braum, directs his executors to sell all his chattels and personal effects, and he authorizes and directs them “to apply” the proceeds thereof, and all the rest, residue and remainder of his estate, after the payment of legacies for which specific provision had been made “to such charitable institutions, which are under Protestant management, as my said executors, or a majority of them who may act as such, may choose.”

The plaintiffs, the executors, have commenced this action to obtain the judgment of this court as to the construction and validity of this portion of the will, and ask the “advice and direction” of the court as to their duty in the premises.

It must be admitted, “*in limine*,” that the objections interposed by the learned counsel for the defendants suggest doubts with respect to the validity of these general directions, and this unbounded authority to the executors, by which his benevolent intentions towards charitable institutions under Protestant management, without limit as to locality, is sought to be effectuated.

The executors have themselves been in so much doubt and hesitancy that they have hitherto refrained from positive action, and have felt constrained to bring this suit. The testator, while living, could have directly given his money to advance the charitable purposes of any institution of the general class above described, wheresoever it might be situated. Instead

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of doing that he has seen fit to constitute the executors under his will his trustees and agents, and the almoners of his bounty, with authority to apply the funds he has placed under their control to any charitable institutions under protestant management as they may elect. It is objected that there is no charitable institution in this, or any other country, which could, through a court of equity, compel the execution of the trust or discretion lodged in the executors in its favor.

The substance of the objections is that courts of equity carry trusts into effect only when they are of a certain and definite character, and that when a trust is created in terms so vague and indefinite that a court of equity cannot clearly ascertain its objects, or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general fund of the creator of the trust (*Story Eq. Juris.*, secs. 964, 979; *Holmes agt. Mead*, 52 *N. Y.*, 332). Similar objections were raised and considered in the case of *Power agt. Cassidy* (79 *N. Y.*, 327; *S. C.*, 16 *Hun*, 294). It is urged on behalf of the executors that this case is brought directly within the principle announced in *Power agt. Cassidy*, and that for the reasons there assigned the present bequest must be upheld.

I have carefully considered this subject and have reached the conclusion, not, however, without some hesitation, that the plaintiff's contention must prevail. It is true that in *Power agt. Cassidy* there was a limitation as to place. Charitable and religious institutions in New York only could take anything under the will of Power; and in that action it appeared by the pleadings that the trustees had already executed the trust to the extent, at least, of determining what particular societies in the city of New York should participate in the fund set aside for charitable and pious purposes.

In that case it was urged, and in the early decisions therein some prominence was given to the fact, that the limitation imposed by the testator as to the locality from which the beneficiaries were to be selected avoided the objection as to

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indefiniteness or vagueness. But, upon reflection, I cannot conclude that this latter fact, of partial limitation, is controlling. Upon a careful examination of the opinion pronounced by the court of appeals, I do not find that the fact of the limitation to the city of New York influenced the decision.

The purposes of the testator, and the object of the trust, are quite as clearly announced and pointed out in the present case as they were in *Power agt. Cassidy*, and in both cases the testators designated a class of institutions reasonably well defined from which a selection was to be made.

In the one case there is a limitation as to place; in the other no limit as to locality is imposed. But that does not affect the question as to a designation of a particular class. And if the execution of the trust could be enforced in a court of equity in the former, I see no reason why it could not be in the latter case.

That the trustees had made their selection before they were brought into court at the instance of the widow of the testator Power, did not control the decision as to the validity of the trust itself. Such selection only made the task of the court, in giving effect to the testator's will, more simple.

The validity of the testamentary disposition in creating the trust depended upon its terms and its construction; and whether or not it should be enforced, was not dependent upon extrinsic facts or the acts of the executors.

As the moneys had not been paid over by the executors in *Power agt. Cassidy* when the action was commenced, the action of the executors in making a selection would have been nugatory, had the trust itself failed to secure the approval of the court.

And upon the authority of that case had the plaintiffs in this action made their selection of some charitable institution or institutions from the class designated by the testator, competent in law to take a bequest, and had they paid over the moneys instead of bringing this action for advice and instruction, I cannot think that their action would have been inter-

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ferred with, but that otherwise, upon the settlement of their accounts such payment would have been allowed as a proper discharge of duty, and as a suitable application of the moneys in their hands, according to the will of the testator.

Upon the hearing it was, however, stated by the learned counsel for the plaintiffs, that the executors had in fact made a selection of one or more societies to whom they desired to pay the money. Nothing is, however, said upon that subject in the complaint. As the plaintiffs seek in this action to close up the whole matter in their hands, including the testamentary directions in this particular, and as that is a matter in which the defendants are concerned, the institutions selected to receive the moneys should be brought in as parties to this action, and evidence should be adduced as to their competency in law and under the will to take the money set apart to them respectively. The will speaks of institutions. A selection of one only would not answer the terms of the bequest. More than one should be chosen. The conclusion reached is that the bequest in question is valid, and should be enforced according to the directions of the testator. But it is directed that the case stand over until the third Monday of October next, to enable the plaintiff in the meanwhile to bring in as parties defendant the charitable institutions chosen by the executors, from the class designated by the testator, when the case will be disposed of upon the principles above suggested.

Ensign agt. St. Louis and San Francisco Railway Co.

SUPREME COURT.

ANDREW J. ENSIGN, appellant, agt. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. (THREE CASES).

Submission to arbitration — When it does not operate as a discontinuance of the actions — Stay of proceedings — Practice.

In March, 1880, these three actions were pending in this court, having been referred to a referee to hear and determine. There were also several suits pending in the circuit court of Christian county, Missouri. The parties entered into an agreement to submit all their matters in difference to two arbitrators for settlement, "said arbitrators finding an award to be final, and conclusive on the parties hereto." The submission also contained a clause, that "all suits now pending" are hereby suspended until the award of said arbitrators is made, when the same shall be dismissed:

Held, that this language indicates an intention upon the part of both parties that the submission should not operate as an absolute discontinuance of the several actions.

The suits were simply suspended during the time required to execute the arbitration, and when the award was made then the actions were to be dismissed. They could not regularly be moved by either party during the lifetime of the submission.

Where it was said by plaintiff that the submission was procured by fraud; that the arbitrators were stockholders of the defendant and therefore not proper persons to act as arbitrators, and that the submission had been revoked:

Held, that if these allegations were true the orderly course for the plaintiff to pursue would be to make a motion or bring a suit to set aside the submission.

Fourth Department, General Term, January, 1881.

Before TALCOTT, P. J., SMITH and HARDIN, JJ.

APPEAL from an order made at the Jefferson special term, staying all proceedings in the three actions "until the award is made in the arbitration referred to in the papers read on

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motion, and in case no award is or shall be made as aforesaid, then until the further order of the court."

The defendant, upon the affidavit of John O. Day, which set out an agreement between the parties to arbitrate all matters and differences between them, applied for the stay.

The plaintiff read his affidavit in opposition to the motion, in which he set out several new matters, and upon which he asserts the motion should have been denied. The defendant had no opportunity to answer the new matter so set out in plaintiff's affidavit.

A. B. Moore and John Lansing, for appellant.

McCartin & Williams, for respondent.

HARDIN, J.—In March, 1880, these three actions were pending in this court, having been referred to a referee to hear and determine.

There were also several suits pending in the circuit court of Christian county, Missouri.

The parties entered into an agreement to submit all their matters in difference to the arbitrament of Calvin Littlefield and Ozias Bailey, for settlement, "said Littlefield and Bailey finding an award to be final and conclusive on the parties hereto."

The submission also contained a clause that "all suits now pending" are hereby suspended until the award of said arbitrators is made to the said circuit court of Christian county, when the same shall be dismissed.

This language indicates an intention upon the part of both parties that the submission should not operate as an absolute discontinuance of the several actions (*Ex parte Wright*, 6 Cowen, 399; *Jacoby agt. Johnston*, 1 Hun, 243; *Buel agt. Dewey*, 22 How., 342; *Baldwin agt. Bennett*, 4 Hun, 120).

The suits were simply suspended during the time required to execute the arbitration, and when the award was made, then the actions were to be dismissed.

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The actions could not regularly be moved by either party during the lifetime of the submission.

But it is said in behalf of the appellant that the submission was procured by fraud, and, secondly, that the arbitrators were stockholders of the defendant, and therefore not proper persons to act as arbitrators, and, thirdly, that the submission has been revoked. If these three allegations be true, the orderly course for the plaintiff to pursue would be to make a motion or bring a suit to set aside the submission.

The defendant ought to be given an opportunity to meet such averments before the court passes upon them.

The form of the revocation is not before us ; we express no opinion as to its validity (*Jacoby agt. Johnston, supra*).

It is also said that the defendants have waived the submission by admitting service of notice of hearing of these cases before the referee, and by moving the cases in the circuit court of Christian county, Missouri, and taking judgments therein since the submission. These questions can be considered when proceedings are taken to vacate or set aside the submission. We should affirm the order staying proceedings without prejudice, however, to the right of the plaintiff to take such steps as he shall be advised to vacate the submission.

The order should be affirmed, with ten dollars costs in one case only, and disbursements in all the cases.

TALCOTT, P. J., and SMITH, J., concurred.

Potts agt. Mayer.

COURT OF APPEALS.

FREDERICK A. POTTS, respondent, agt. ISAAC MAYER, impleaded
with ELKIN HYMAN.

*Testimony of party dying after trial is evidence on new trial—When party,
&c., cannot be examined—Code of Civil Procedure, secs. 829, 831.*

When on the trial the plaintiff read in his own behalf the cross-examination of H., a deceased, party taken on a former trial, showing what had nowhere else appeared in the case, the existence of an indebtedness from the defendant M. to H., and which constituted the agreed consideration of the note :

Held, that by this proof or the sworn declarations of the deceased, the plaintiff encountered the exception in section 829 of the Code of Civil Procedure, and exposed himself to the evidence of the defendant M. as to the same transaction.

October, 1881.

ACTION upon a note, dated March 3, 1874, made by Hyman and Mayer to their own order, and by them indorsed for \$1,571.39, also indorsed by Sigmund Kohn, and by him delivered to the plaintiff.

The answer set up that the note was made upon a representation that Hyman was indebted to Kohn in the sum of \$1,200 ; that Kohn was to have the note discounted, and pay the difference between the \$1,200 and the proceeds of the discount to Hyman ; that there was, in truth, no indebtedness from Hyman to Kohn, but on the contrary Kohn was largely indebted to Hyman, and in fact there was no consideration for the note, and that Kohn was to have the note discounted and return the whole proceeds to Hyman. That subsequently Hyman & Mayer dissolved partnership, and that upon such dissolution, Hyman assumed and agreed to pay the partnership indebtedness. That Kohn did not have the note discounted, but passed it away for an old indebtedness to the plaintiff, and that the plaintiff was not the real party in interest.

Potts agt. Mayer.

On the trial the defendant Mayer claimed and was allowed the affirmative of the issue.

It was concluded on the trial that the plaintiff stood in no better position than Kohn.

The defendant examined the plaintiff, and then read the evidence from printed report of former trial given by Elkin Hyman who, it was admitted, was dead.

The proof showed that Hyman paid Mayer for the making of the note.

After having read Hyman's deposition proving that he gave Mayer value for the note, the defendant was called on his own behalf, and was asked if that evidence was correct. The inquiry was objected to and excluded, and exception taken.

Richard S. Newcombe, of counsel for respondent.

I. The defendants who held the affirmative of the issue, read the evidence of Elkin Hyman, who was one of the partners of Hyman & Mayer, and who died before this trial. In that evidence Hyman on his direct examination testified that he, Hyman, had paid his partner Mayer for the note in suit; upon that he was simply cross-examined. The proof so given was Hyman's version of the consideration of the promissory note, and that showed that the note was made for value received. This proof having been given by the defendants, they sought afterwards to prove by Isaac Mayer the surviving partner of Hyman & Mayer that the fact was different from what their witness Hyman had testified. This we say was properly excluded. 1st. Because Mayer was an incompetent witness, Hyman being dead, as to transactions between him and Hyman, under section 829 of the Code. The plaintiff derived his title through a deceased person (Hyman) and the plaintiff had not given Hyman's testimony in evidence. The defendant gave that in evidence, not the plaintiff.*

*Section 830 of the Code has no application, not having been passed until several months after this trial.

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FINCH, J.—We think the evidence of Mayer offered to contradict the statement of Hyman that he has paid for the note in suit was improperly excluded. The objection made to it rested upon section 829 of the Code. Hyman was a party defendant and on a former trial had been examined and cross-examined as a witness giving material evidence bearing upon the inception and consideration of the note. He died before the last trial of the case, and upon that occasion his testimony upon the former trial was read in evidence. The direct examination of the witness was read in behalf of the defendant Mayer. Among the questions asked him was what Kohn the indorser gave him for the note. The witness replied that Kohn gave him nothing, and added the statement, not at all responsive to the question, “but I paid for the note to Mr. Mayer.” So far as it went this last statement was material to the plaintiff, and adverse to the theory of the defense. That theory rested upon an alleged diversion of the note from its lawful use, which could not be true if it passed to Hyman for a full and valid consideration. But the statement of the witness tending to establish this fact was not only volunteered and unresponsive, but incomplete and imperfect, since it left the allegation of payment without explanation and in a form somewhat doubtful and equivocal for the purposes of the plaintiff. The latter, realizing this fact and not choosing to leave the evidence open to doubt and criticism, thereupon read in evidence his own cross-examination of the witness as to what he meant by his statement of payment to Mayer, and thus put in evidence a distinct statement of Hyman that Mayer was indebted to the witness in the amount of the note upon a private account between them for which consideration the note was given and received. In so doing he plainly put in evidence for his own purposes and in his own behalf material and important declarations of the deceased. By reading his cross-examination the plaintiff got the benefit of his testimony, and that testimony was given in evidence by the plaintiff, and in his own behalf. His was

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the only inquiry as to the particular transaction between Hyman and Mayer; the defendant having asked no questions which involved their personal dealings. When therefore the defendant sought to contradict by Mayer the evidence of Hyman as to the consideration of the note and the indebtedness upon which it was founded, and was not permitted to do so, the ruling was erroneous. The offered evidence was within the letter and spirit of the exception in the Code which permits such evidence to be given where the testimony of the deceased person is given in evidence concerning the same transaction or communication. (*Code, sec. 829*). The obvious intention of the statute is to preserve equality and prevent unfair advantage. The mouth of the survivor is closed because the other party to the transaction is dead, and to allow the living witness to speak, secure from the contradiction or correction of his adversary is to give him an advantage manifestly unfair and dangerous to the truth. Such inequality and injustice does not exist, however, where the deceased party has spoken and his statement of a transaction is put in evidence. In that event to allow the dead man to speak through his declarations while living, and deny the right of contradiction or correction to the surviving party would shift the unfair advantage to those representing the deceased party, and it was to obviate such injustice that the exception in the statute was framed. The question is not, as the respondent states it, whether a party can put in evidence the adverse statements of a deceased party and so open the door to his own version of the same transaction. If that was in truth the question we should be very likely to feel the force of respondent's argument in favor of excluding the proposed contradiction. But hear the plaintiff himself read in his own behalf the cross-examination of the deceased party, showing what had nowhere else appeared in the case, the existence of an indebtedness due from the defendant Mayer to Hyman, and which constituted the agreed consideration of the note. By this

Attorney-General agt. Continental Life Insurance Company.

proof of the sworn declarations of the deceased the plaintiff encountered the exception in the Code and exposed himself to the evidence of the defendant Mayer as to the same transaction. The ruling which excluded the offered proof was therefore erroneous.

Judgment reversed, new trial granted, costs to abide the event.

All concur.

SUPREME COURT.

ATTORNEY-GENERAL agt. CONTINENTAL LIFE INSURANCE
COMPANY.

Insolvent insurance company—Power of court to make allowance to counsel out of fund in receiver's hands for services rendered in proceedings, which have for their purpose and effect the protection of the general fund, though brought in the name of an individual and for his own benefit.

Where an attorney was employed by an individual to bring a suit or conduct proceedings against an insolvent insurance company, whose assets had been placed in the hands of a receiver, such proceedings having for their purpose and effect the protection of the general fund and assets of the company, and their concentration in such shape and under such control as should be for the benefit of all policyholders and others concerned in the same :

Held, that the court has power to order the services paid for out of the funds in the hands of the receiver.

The protection of trusts requires representative proceedings, and *when necessary and proper* should be encouraged, and the court as the administrator of the trust has the power to compensate those who aid it in the discharge of their duty.

Ulster Special Term, September, 1881.

APPLICATION by Raphael J. Moses, on report of H. J. Scudder, for an allowance as counsel to be paid by receiver.

R. J. Moses, Jr., in person, for the allowance.

Wingate & Cullen, opposed.

Attorney-General agt. Continental Life Insurance Company.

WESTBROOK, J. — It was my intention to write a full opinion on this motion, giving my reasons for confirming this report, but the demands upon my time are so numerous and pressing that it is impossible. I content myself therefore with this memorandum.

A very learned and able lawyer and upright man, acting as referee, has found, after a full hearing, not only in this matter, but after a long and exhausted inquiry into the affairs of the Continental trust, which peculiarly fitted him to judge of the value and extent of the labors of Mr. Moses, that Mr. Moses “has rendered very valuable services — *services indeed of a most meritorious character*, and occupying very considerable time and involving much labor and investigation upon his part, * * * * and had for their purpose and effect the protection of the general fund and assets of “the Continental Life Insurance Company, and their concentration in such shape and under such control as should be for the benefit of all policyholders and others concerned in the same.” There is no question then, either as to the meritorious character of the services, or their value, and the only question is, has the court power to order the services paid? On this point I have no doubt either on authority or principle. Allowances under such circumstances have been frequently made by other judges, as well as by myself, in this state, and that power has also been recognized in other states and in England. The court is the custodian and administrator of the estate. In the discharge of its duties, it needs assistance both to protect the trust and to enlighten its conscience as to its execution. There must therefore always be representative suits and proceedings, which, though in the name of individuals for their own benefit, are really for the benefit of hundreds of others as well. To hold that these persons who sustain all the labor and anxiety of proceedings, which are as much for others’ benefit as their own, should in addition bear all the expenses would be unjust and deter proceedings which ought to be taken. Upon the ground: 1st.

Whitman agt. James.

That those who receive the benefit of labor ought to pay for it; and, 2d. That the protection of trusts requires representative proceedings, and that, *when necessary and proper*, they should be encouraged and not discouraged; and, 3d. Because the court, as the administrator of the trust, must have the power to compensate those who aid it in the discharge of their duty, the report of the referee is confirmed.

N. Y. COMMON PLEAS.

ALFRED WHITMAN and another, agt. JOHN D. JAMES and another.

Order of arrest — Execution against the person — Validity of an execution against the person of one defendant, where an order of arrest had been granted against two defendants who were copartners, but executed only against one — Code of Civil Procedure, section 1487.

Where, in an action to recover money received, an order of arrest was granted against the two defendants, who were copartners, upon facts extrinsic to the cause of action set up in the complaint, and such order of arrest was executed against one defendant, and judgment was afterwards entered against the defendants and execution issued against the property of both, and then the execution against the person of the defendant against whom the order of arrest was executed was issued:

Held, that such execution against the person was valid, notwithstanding the order of arrest was not executed as against both the defendants, and the execution issued did not run against both the defendants

Special Term, August, 1881.

Forbes & Sage, for plaintiffs.

McDaniel & Souther, for defendant James.

VAN BRUNT, J. — This is a motion to set aside an execution issued against the person of the defendant John D. James, on the ground of irregularity.

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This action was to recover money received, and an order of arrest was granted against the defendants upon facts extrinsic to the cause of action set up in the complaint, and such order of arrest was executed against the defendant John D. James. The case was tried and a judgment was entered against the defendants, who were copartners. An execution against the property of both the defendants was issued to the sheriff, and then the execution against the person of John D. James, who was arrested under the order of arrest, was issued, and this motion is to set aside this execution.

It is claimed that because the order of arrest was not executed as against both the defendants, and as the execution issued does not run against both the defendants, that it is irregular and void.

This motion is based upon the theory that the execution does not follow the judgment. This rule, an examination will show, applies solely to those cases where the right to issue an execution against the person follows from the fact of a judgment having been obtained in the action, and does not depend upon any previous proceeding in the action. It applies to cases where the gist of the action is a tort, and where, if a judgment is obtained, an execution against the person may be issued as a matter of course. But in this action the right to issue the execution does not depend on the fact of having obtained a judgment alone, because section 1487 prescribes the cases in which an execution may be issued against the person, the first being where the plaintiff's right to arrest the defendant depends upon the nature of the action, and the second being in any other case where an order of arrest has been granted and executed in the action, and if it has been executed against the judgment debtor, where it has not been vacated.

An order of arrest was issued against the defendant James, and executed and not vacated, which brings him within the provisions of the several subdivisions of this section of the Code; and because the order of arrest issued against his

Goodwin agt. Howe.

codefendant Wilson has not been executed, no execution could be issued against the person of Wilson.

Now if in an action against several defendants, where an order of arrest has been issued against all the defendants and executed against all but one, and it has been impossible to execute the order against that defendant, the claim of the defendant James in this action is well founded, all the other defendants are exempted from the execution against the person because the plaintiff has found it impossible to execute the order of arrest against a codefendant. Such a result was never contemplated by the Code, and such a construction, unless compelled by the language of the Code, should not be put upon it.

I am of the opinion that the authorities cited, that an execution against the person must follow the judgment, do not apply to the case where the right to issue an execution does not depend on the nature of the action.

The motion to set aside the execution must therefore be denied, with ten dollars costs.

SUPREME COURT.

SHELDON GOODWIN, executor, &c., under the will of DAVID LEAVITT, deceased, agt. ELIZABETH L. HOWE and others.

Will — construction of — Duty of trustees holding funds for investment for the benefit of minor children.

Where, in a will, the testator directs his estate to be divided into a certain number of shares, and that one of said shares shall be held in trust to keep the same invested and to receive the rents, income and profits thereof, and pay the same over to the beneficiary named as they accrue and are collected, and the property devised by the testator is not invested in securities recognized by the rules of law applicable to investments by trustees, the trustee must sell and reinvest in accordance with such rule.

Special Term, August, 1881.

Goodwin agt. Howe.

George C. Kobbe, for plaintiff.

Whitlock & Simonds, for guardian *ad litem*.

Lindley & Lindley, for adult defendants.

LAWRENCE, J. — This action is brought for the purpose of obtaining a construction of the sixth clause of the will of the late David Leavitt, and of the first and second codicil to said will.

By the original provision of the will the testator directed, among other things, a division of his residuary estate into five parts, one of which parts he gave to his executors in trust to divide the same into four shares. In relation to one of said shares the will provides as follows: "Also upon trust to set apart and hold one other of said four parts or shares for the benefit of Frank K. Leavitt, son of my son Sheldon Leavitt, lately deceased, for and during his natural life, but not exceeding ten years from the date of my decease, in trust, to keep the same invested and to receive the rents, income and profits thereof and pay the same over to the said Frank K. Leavitt as they accrue and are collected, after deducting all necessary expenses and charges. If the said Frank K. Leavitt should live more than ten years after my decease, then at the expiration of said ten years, I direct that said trust be terminated, and the principal shall belong absolutely to said Frank K. Leavitt, and be delivered and conveyed to him by said trustees for his own use forever."

By a codicil to the will, dated the 11th day of April, 1878, the testator revoked the provisions of his will as to one of the four shares of said one-fifth part of his residuary estate, given by his will to one Josephine D. Crane, and directed his executors to divide said one-fifth part into three shares and not four. One of the said three shares of said one-fifth part was given by said codicil to said Frank K. Leavitt. Then by a second codicil to said will, dated November 24, 1879, the testator provided that the trust created for Frank

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K. Leavitt by the will should continue during his life, and that at his death the principal of said share should be distributed among his widow and next of kin, according to the laws of the state of New York, as if he had died possessed of said share.

Frank K. Leavitt has one child, Frank Sheldon Leavitt, an infant, who is one of the defendants in this case.

Since the case of *King agt. Talbot* (reported in 40 *N. Y. R.*, 76), there is no room for doubting that a trustee holding funds for investment for the benefit of minor children must invest in government or real estate securities, and that any other investment would be a breach of duty, and the trustee personally liable for such breach.

It is true that there are cases in this state in which it has been held that executors are not liable for the mere neglect to change the investment made by the testator of funds bequeathed by his will. But in this case I am called upon to decide affirmatively that in consequence of the fact that the testator had invested certain portions of his personal property in different kinds of securities, and of certain expressions in his will contained, he has devolved upon the executor and trustee the right to retain the investment thus made without incurring the liability or obligation which he would otherwise have incurred if he had made such investment on his own personal responsibility. Without undertaking to go over the cases which have discussed this subject, I deem it sufficient to say that I can find nothing in the will which justifies me in advising the trustee that it is competent for him to depart from the rule laid down in the case of *King agt. Talbot*, and even although an adherence to that rule may result in a diminution of income to the present beneficiaries under the clause in the will in question, I would not be warranted in disregarding the rule, the rights of an infant being concerned. It seems to me, therefore, that I cannot grant the relief which is asked for by the plaintiff, and the complaint must be dismissed, with costs.

Stoddart agt. Key.

SUPREME COURT.

JOSEPH M. STODDART, JR., agt. H. H. KEY and others.

Contract — Law of place — Words “ & Co.,” when used by a person who has no partners — Illegal defense must be pleaded — Principal and agency — What amounts to an abandonment of agency — Rights of principal.

The plaintiff, a resident of Philadelphia and a publisher of books at that place, under a firm name of “J. M. Stoddart & Co.,” but having in fact no partner, entered into a contract under the name of “J. M. Stoddart & Co.” with the defendant Key, at the city of Philadelphia, in respect to the canvassing for and selling by Key of the American reprint, of the “*Encyclopædia Britannica*,” in the states of *New York and New Jersey*. Key was to report to Stoddart at Philadelphia, from which place all the supplies were to be ordered and forwarded:

Held, in an action brought in this state in favor of Stoddart against Key and others, founded upon the contract, that the contract was not void, under the statutes of New York, which forbids the carrying on of business by an individual in a firm name, or the use of the words “& Co.” when it represents no actual partner (*Laws of N. Y.*, 1833, chap. 281). As a general rule the law of the state, when contracts purely personal are made, must govern as to their construction and validity, unless made in reference to the laws of another state in which they are to be performed.

When it is claimed that a contract is void because made in violation of the act forbidding the use of the words “& Co.,” when they do not represent an actual partner, the illegality must be set up affirmatively as a defense, and if not pleaded it cannot be urged upon the trial, when the fact appears, as a ground for dismissing the complaint (*O’Zoolé agt. Garvin*, 1 *Hun*, 92).

When an agent, under a contract regulating his services and compensation as a canvasser of books in process of publication, writes to his principal as follows: “I have determined to sell out and give up this business; if you want it, come or send on, and I will give you the figures which I will take; this is final:”

Held, that the principal was justified, after making a fair and reasonable proposition to settle, which was not accepted, and the good faith of the agent was reasonably suspected, under the facts and circumstances of the case, as stated in the opinion, in treating the defendant’s action as an abandonment of the agency, and in at once appointing another person in his place, and that a sale of the list of subscribers, or an attempt to release them, made by Key thereafter, was invalid.

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Edward Patterson and *Josiah R. Sypher*, for plaintiff.

Burton N. Harrison, for defendants Key and Hall.

B. F. Dunning, for defendants Scribner, Armstrong & Co. and Hall.

VAN VORST, J.—The contract of the 9th day of June, 1877, by the terms of which the defendant Key agreed, for the consideration therein expressed, to serve the plaintiff in canvassing for and selling the American reprint of the "Encyclopædia Britannica," was made in the state of Pennsylvania. Although the canvassing and selling under the contract was to be done by Key in the states of New York and New Jersey, yet he was to report to the plaintiff at Philadelphia, where the book was published, and from whence he was to receive his supplies.

By the agreement Key was to forward to the plaintiff, at Philadelphia, at the end of each week, the name and address of each subscriber secured by him during the previous week, and, as far as possible, the name and address was to be written on the "contract order" prepared and furnished by the plaintiff.

These orders were to be held by the plaintiff as collateral security so long as Key should faithfully fulfill the conditions of his contract, and in case of the non-continuance of the agency by Key, or his non-fulfillment of the conditions of the contract, the orders were to become the property of the plaintiff to the extent of Key's indebtedness to the plaintiff, the balance of Key's commission or earnings under the contract, after the payment of his debt, was to revert to him or his assigns.

After entering into the agreement Key proceeded to canvass for the work, and procured some one hundred and fifty subscribers, or thereabouts, to whom the work published by the plaintiff was delivered as the volumes were issued. The work was to run through twenty-one volumes. At the time the agency was abandoned by Key, as is hereinafter men-

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tioned, six volumes had been published and delivered to subscribers.

The evidence shows that Key did not make, as he was required to do, regular and accurate reports of the names of all the subscribers.

The construction to be given to the letter of Key, written on the 31st day of January, 1878, to the plaintiff, based upon its language and his subsequent conduct, is that he, on that day, for all practical purposes, abandoned the contract and his agency thereunder.

Before that day he had heard of a new enterprise which was being formed under the direction of the defendant Hall, which opened to him hopes in another direction, and disturbed his loyalty to the plaintiff and his particular work. He had evidently lost faith in the plaintiff's success.

In this letter, Key alludes to this cheap English edition of the *Encyclopædia* which Mr. Hall, who had just returned from Europe, was about to put upon the market.

In concluding his letter he says:

"Since writing the above, I have determined to sell out and give up this business. If you want it, come or send on, and I will give you the figures which I will take. This is final."

At this time Key owed the plaintiff about \$1,400 for books delivered to him under the contract for subscribers.

By the terms of the agreement he had an interest in the commission earned by him, subject to the payment thereof of the moneys due from him to the plaintiff. It must be considered that it was such resulting interest only which he could sell to any person other than the plaintiff. For it cannot be supposed that he could sell the contract and substitute a third person in his place, to assume its burdens and reap its future advantages, without the plaintiff's concurrence.

The natural effect upon the plaintiff of such a notification as was contained in the defendant's letter of the thirty-first of January, would be to excite his apprehension and move him to prompt action.

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The plaintiff had a large amount already invested in this enterprise, and Key's field of operation under the contract was important.

The notification contains a clear and unqualified expression of Key's abandonment of the business and of his final determination to sell out. It contains an implication of a right to sell to others, for he says, if "you want it" come or send on and I will give you the figures.

There was no other course open to the plaintiff, under such circumstances, than to take the defendant at his word. Any delay or hesitancy would only imperil the plaintiff's enterprise.

In reply to this letter the plaintiff immediately telegraphed the defendant that to "secure a settlement" he must come to Philadelphia without delay, and bring his record books and accounts.

On the second day of February the defendant went to Philadelphia; and in an interview with the plaintiff he said he was troubled about the business, had decided to give it up, and was going to South America. He said he wanted to be paid for the orders he had obtained, and would sell out his interest for fifteen per cent of the prospective value of the volumes yet to be delivered.

The plaintiff at once accepted the defendant's offer, and said he would pay him the fifteen per cent demanded, but would require the orders to be proved by the delivery of one volume on each order.

This requisition, which must be considered as reasonable, the defendant refused. He said he wished to be settled with and immediately receive his money.

Plaintiff stated that in that way he might be paying for something that did not exist, but would adjust the matter in the way he mentioned. No such result being reached, the plaintiff said his business in New York must be protected, and that he would at once procure some other person to attend to it.

To this the defendant objected, saying that the plaintiff

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should do nothing towards carrying on his business until he had settled with him.

Plaintiff at once appointed a person in New York to attend to his affairs. Key gave no further attention to his duties under the contract, but did enter into arrangements with Hall, the effect of which, if successful, will prove destructive to the plaintiff's rights under the contract and injurious to his enterprise in general.

The subsequent action of Key clearly enough shows that he entertained no idea of going to South America, and that it was simply assigned as a plausible reason for abandoning his contract with plaintiff. His action afterwards shows that it was his then intention to enter into the service of Hall, and under him circulate the rival edition of the *Encyclopædia*, to the exclusion of the plaintiff's work. This secret purpose led him without doubt to reject the plaintiff's reasonable request to test the accuracy of his orders by the delivery of one volume of the work, as a basis of fixing the fifteen per cent upon future deliveries.

That it was the purpose of the defendant Hall to injure the plaintiff's enterprise appears by the evidence of Alvin J. Johnson, which is not contradicted. Hall said to Johnson: "We will get all the plaintiff's canvassers, and we will get all their subscriptions, and they can never finish the work." Having made some arrangements with Hall, the defendant, assuming to act as the agent of the plaintiff, during the month of February called upon several of the subscribers to the plaintiff's work, and in writing released them, or assumed to do so, from their obligation to receive the remainder of the volumes, and he agreed to take from them such of the volumes as they had already received under their subscriptions, and exchange for them volume for volume of the English edition, and to deliver to them the remaining volumes of that edition. Key, afterwards aided by Hall, carried out that arrangement with several persons. Several of the subscribers to plaintiff's book, who were induced to make such change,

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were informed by Key in substance that the plaintiffs were not able to complete the publication of their work through a want of necessary funds.

To at least two persons defendant Key stated that he had sold the list of subscribers which he had obtained for plaintiff's work to the defendant Hall, or to the defendants Scribner, Armstrong & Co., for a pecuniary consideration. Hall's substantial relation to this controversy may be shortly stated. He had originally, and in the fall of the year 1877, some arrangements with the house of Little & Brown, of Boston, the importers of an English edition of the *Encyclopædia*, by which he would circulate the work in this country. Hall had some special relation to the house of Scribner, Armstrong & Co., in connection with the circulation by subscription of some books they were publishing. He was so connected with Bryant's "History of the United States" and a work on birds. They had no connection with Hall's work on the English *Encyclopædia* other than as guarantors that he would pay for such books as he might receive from Little & Brown.

In the end and about the month of April, 1878, and after the commencement of this suit, by an arrangement they made with the English publishers abroad, they became the importers of the book instead of Little & Brown, and are now the receivers of the same in this country.

At the times, however, during which the matters in controversy herein arose, they had no actual interest in the work. It was Hall's individual concern, and what he did with Key was on his own responsibility and in his own interest.

But having become responsible through their guarantee to Little & Brown for the delivery to Hall, Scribner, Armstrong & Co. preferred in the end to receive the books themselves. And with reference to such contingency and the readjustment of their own copartnership, which had become dissolved through the death of one of its members, an arrangement was proposed to be made in the future for its circulation through Hall. But the evidence is not clear whether any such arrange-

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ment has been in fact made, as the contemplated copartnership, according to the testimony of Mr. Armstrong, was never formed.

But the present house of Scribner, Armstrong & Co. do import and circulate the English edition, and have so done since April, 1878.

Mr. Armstrong, formerly in the firm, and who continued therein until June, 1878, had the management it would seem of the details of this business, and made upon the trial a statement in respect to the attitude of his house with respect to the book and the defendant Hall. His firm knew nothing of the list of subscribers obtained by Key for the plaintiff's book, nor of his engagements with plaintiff. They never purchased from him his list of subscribers and had no connection therewith.

And although in the end they employed Key to canvass for their edition of the work, they refused to allow an exchange of their books for the plaintiff's books.

I find nothing in the evidence which involves any member of the firm of Scribner, Armstrong & Co. in any of the acts of Key or Hall injurious to the plaintiff, or any adoption of his arrangements with Key. It is true Hall was in their service and was engaged in the circulation of special works, and in the end was connected with the English edition of the *Encyclopædia*, after they obtained the control. But the interest of Scribner, Armstrong & Co. in the work did not arise until after the commencement of this action.

But such equitable relief as the facts justify should be awarded to plaintiff.

Any attempt on the part of Key to sell or dispose of the lists of subscribers to Hall or any other person, under the facts of this case, was wholly without justification, right or power. Indebted as he was to the plaintiff, and having abandoned the service in which he was engaged, he could not, by the terms of the agreement, make any disposition of the orders obtained. In such contingencies the orders and lists belonged to plaintiff, subject to the payment, out of the moneys realized as

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commission or compensation for subscribers obtained by him, the amount of plaintiff's claim against him.

Under the circumstances he had no power to execute releases to the subscribers of their engagements to take the remainder of the volumes. I am not certain, however, that the releases can here be set aside. The parties taking them are not before the court, and they probably acted in good faith, not doubting the power of Key to discharge them, and perhaps had no notice of the termination of his agency. I infer that to be the case with reference to such of the subscribers as were examined as witnesses. But it is not necessary to pass upon that question. In so far as a judgment can be made to protect the plaintiff against the action of Key and Hall, equity requires that it should be done.

But before determining the special relief to which plaintiff is entitled, it becomes necessary to examine a question which has been presented by the counsel of all the defendants.

This objection is founded upon the fact, which clearly appears in the case, that the plaintiff was carrying on business in a firm name. He, as an individual, transacted business and entered into the contract with Key under the name of "J. M. Stoddart & Co." The term "& Co.," which follows plaintiff's name in the contract and signature thereto, represented no actual partner in his business.

This is claimed to be a violation of the laws of this state, and it is insisted by the learned counsel for the defendants that this contract cannot form a basis of an action for equitable relief here (*Laws of New York of 1833, chap. 281*). Should we unqualifiedly accept the defendant's contention, that in so far as the performance of the contract within the state of New York was concerned it would involve a transgression of our law, yet in no event would that condemn the contract wholly or justify the defendant's action. The contract was designed to be performed in New Jersey and Pennsylvania, as well as New York. There was a considerable territory in New Jersey over which the defendant's agency extended.

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But the contract was not made in New York. There is no room for the suggestion that this contract was made with any design to violate our law, or that it was made otherwise than in the ordinary course of the plaintiff's business in the state in which he lived, from whence the book on which he was engaged was to be forwarded, and to which the defendant was to make his reports and returns as agent. In a true sense the plaintiff's business was not conducted in New York, but in Pennsylvania.

There is nothing to show that there was any illegality in the contract by the laws of the state where it was made, and the presumption is that it was entirely valid there.

Should a question ever arise between a subscriber to the work in New York and the plaintiff as to the validity of a subscription or order made with the plaintiff under the name, J. M. Stoddart & Co., it would be limited to such controversy.

I do not think the defendant should be allowed to anticipate or raise such question here for the purpose of avoiding his engagements with the plaintiff, or to justify his appropriating to himself all the advantages that the plaintiff had gained by the partial performance of the contract through the defendant's agency.

The learned counsel for the defendant has, in an elaborate and carefully prepared brief, presented the question of the illegality of this contract, and has cited numerous authorities to fortify the ground taken by him that the contract is wholly void, and can furnish no ground for equitable redress in this jurisdiction.

In *Pomeroy agt. Ainsworth* (22 Barb., 118, 127), PAIGE, J., formulates the subject in this wise: "As a general rule the law of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are to be performed in another state or country, and were made in reference to the laws of such state or country, in which case their construction and validity depend upon the law of the place of performance."

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This I take to be a correct expression of the law on that branch of this subject.

But should all that is contended for by the defendant's counsel in regard to the inherent invalidity of this contract be conceded, I do not think it should avail the defendants in this action. Nor would he be wholly absolved from responsibility.

He did not originally place his withdrawal from the contract upon any such ground. He assigned totally different reasons for his contemplated action.

Nor have the defendants, or either of them, interposed by answer any such defense, but, on the other hand, the answer of the principal defendant, Key, sets up that the name "J. M. Stoddart & Co." represents a firm composed of several persons.

In *O'Toole agt. Garvin* (1 *Hun*, 92), DANIELS, J., in substance says that this illegality is a ground of defense, and must be affirmatively set up. In that case the illegality of the contract made its appearance during the trial, and for that reason the plaintiff's complaint was dismissed, but the judgment was reversed.

The fact "must be alleged as well as proven." I think the rule laid down in that case should apply here, and that the defendants' application to dismiss the complaint upon the ground that the claimed illegality appeared during the trial, and even in the plaintiff's case, should be denied, and that the plaintiff should have in substance relief against the defendants to the following effect:

As against the defendant Key, that he be ordered and required to deliver to the plaintiff a full list of all the subscribers within the territory mentioned in the agreement to the American reprint of the "Encyclopædia Britannica" at the date of his resignation, January 31, 1878.

That Key be required to account for all copies of the book received by him from the plaintiff.

That he be enjoined and restrained from acting or claiming to act in any manner as agent of the plaintiff or of plaintiff's publication, and from interfering with the sub-

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scription lists to said publication, and from attempting to discharge any subscriber from his subscription thereto, and from inducing such subscribers to change their subscriptions therefrom to the Edinburgh or any other edition of said Encyclopædia.

And as against the defendant Hall, that he be perpetually enjoined and restrained from acting in concert with Key or otherwise in diverting the subscriptions in Key's possession from plaintiff's publication to the Edinburgh edition; that he be ordered and required to restore to plaintiff any subscription list of the plaintiff's publication which may have been delivered to him by Key, and that he be restrained from interfering in any manner with the plaintiff's business in procuring subscriptions to his publication and in delivering volumes of plaintiff's edition to the subscribers thereto; that he be also restrained from delivering by himself or others any volumes of such Edinburgh publication to the subscribers of plaintiff's publication upon any cancellation or change of subscription made by Key or through his agency.

As to the defendants Scribner, Armstrong & Co., they are not shown in any manner to be chargeable with or implicated in Key's conduct towards the plaintiff or the subscribers to his book. They never, through Hall or otherwise, authorized any exchange of the edition of the Encyclopædia which they controlled, with subscribers obtained by Key, and whose orders he attempted to cancel.

But, on the other hand, they refused to allow any exchange of their book for the plaintiff's book. But as such exchanges may be made through the agency of Hall in the subscription department of their house, upon subscriptions to plaintiff's book canceled by Key, they must not suffer it to be done.

In this view, although the complaint may not be absolutely dismissed against the latter defendants, they are not chargeable with costs in this action. But the relief above granted as to the defendants Key and Hall subjects them to the payment of the costs of this action.

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COURT OF APPEALS.

SAMUEL F. PERRY, plaintiff in error, agt. THE PEOPLE,
defendants in error.

Conviction for crime not to exclude witness—how conviction proved—Code of Civil Procedure, section 832.

The Code of Civil Procedure was intended to apply only to civil actions and proceedings, except where otherwise provided; and section 832, declaring "a person who has been convicted of crime or misdemeanor" to be, notwithstanding, a competent witness, before the amendment of 1879 making such convict "a competent witness in a civil or criminal action or special proceedings," did not remove the statutory disqualification as a witness of a person convicted and sentenced for a felony.

Though the record is the best evidence of a conviction, yet although no foundation has been laid for secondary evidence, if without objection from either witness or party the fact of such conviction is proved by parol, and is not disputed, it cannot be disregarded.

Decided October, 1881.

Peter Mitchell, for plaintiff in error.

Daniel G. Rollins, district-attorney, for defendants in error.

RAPALLO, J.—The Revised Statutes (2 R. S., 701, sec. 23) provide that no person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or the legislature, except in the cases specially provided by law.

The Code of Civil Procedure, as passed in 1876 and amended in 1877 and 1878, provides (sec. 832) that "a person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness, but the conviction may be proved for the purpose of affecting the weight of his testimony."

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This section was further amended in 1879 so as to render such convict a competent witness "in a civil or criminal action or special proceeding." The question now arises whether, before this amendment, section 332 applied to criminal cases, the plaintiff in error having been tried and convicted in March, 1879, before the passage of the amendment.

The Code of Civil Procedure purports, from its name, to regulate the mode of procedure in civil cases. The act is entitled "An act relating to courts, officers of justice and civil proceedings." By the explanatory act passed on the same day (*chap. 449 of Laws of 1876*) it is provided (*sec. 4*): "In that act and in this act the word 'action' refers to a civil action; the word 'judgment' to a judgment in such an action; the term 'special proceeding' to a civil special proceeding, and the word 'order' to an order made in such an action or special proceeding, except where a contrary intent is expressly declared in the provision containing the word or term, or plainly apparent in the context thereof."

We think it very clear that this code was intended to apply only to civil actions and proceedings, except where otherwise provided. This view is fortified by reference to the provisions which are in terms made applicable to criminal cases. At the time the plaintiff in error was tried, these were very few. Section 533 provided that a pleading should not be used in a criminal prosecution against a party as proof of a fact admitted or alleged therein. Section 790 provided for a preference in the trial or hearing of criminal over civil cases. Sections 914 to 920 provided for taking depositions in this state of witnesses in civil or criminal proceedings without the state, and by the explanatory act (*chap. 449 of Laws of 1876, sec. 5, subds. 2 and 7*) certain provisions of the Code regulating the drawing of jurors were made applicable to criminal cases. These are, as far as I have discovered, all the provisions of the Code of Procedure having any reference to criminal cases. Section 832 is found in connection with

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other provisions relating to evidence which are not in their nature applicable to criminal trials, and the adoption, in 1879, of the amendment expressly applying that section to criminal cases, tends to show that the section as it stood before the amendment was not regarded as thus applicable. We are of opinion that before the amendment section 832 did not remove the disqualification as a witness of a person convicted and sentenced for a felony.

It is claimed, however, that in the present case the conviction and sentence of the witness were not proved by competent evidence, and therefore his testimony was rightfully received. He testified without objection either on his own part or on the part of the district attorney, that he had been convicted in Troy on an indictment for burglary and receiving stolen goods, and sentenced to imprisonment for four years in the state prison at Dannemora, and that he had never been pardoned. If the objection had been taken either by the witness or the district attorney, the prisoner should not have been permitted to prove the conviction and sentence in this manner. But no such objection was taken. The facts were within the knowledge of the witness, and the only objections to which the testimony was subjected were, that the record was the best evidence, and no foundation had been laid for secondary evidence. But to render such objections available they must be taken when the evidence is offered, for they are capable of being obviated, and if they are not made they are regarded as waived. I have found no authority for the proposition that proof of the disqualification of a witness by reason of his having been convicted of a felony is an exception to the general rule. Those which have been cited are far from sustaining the proposition. *People* agt. *Herrick* held merely that a witness was not bound to answer either on *voir dire* or on cross-examination, whether he had been convicted of crime, and that it was error to compel him to answer when the objection was made by the party calling him. The ground of this decision was that a witness is not bound

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to answer any question which may render him infamous or disgraced. In *Hilts* agt. *Colvin* (14 *John.*, 182), the incompetency of the witness was sought to be proved by parol evidence of his conviction of a felony, and to justify the offer of parol evidence. Proof was given tending to show the destruction of the record of conviction by the burning of the county clerk's office. The objection to the sufficiency of this proof was distinctly taken, and it was insisted that notwithstanding the destruction of the record there still was higher proof than oral evidence, and the court held that the objection was well taken, on the ground that by 1 Revised Statutes, chapter 146, section 2, district attorneys were required to send to the court of exchequer a certificate of every conviction and the judgment given thereon, and such certificate was made by the statute good evidence of such conviction. There is no intimation in the case that if the proper foundation had been laid the fact could not have been proved by parol, even against objection, or that if no objection to the mode of proof had been made it would have been held insufficient to disqualify the witness.

In *King* agt. *Inhabitants of Castell* (8 *East*, 77), the point decided was that the party who called the witness and was interested to have his testimony, had the right to insist on proof by the record of the conviction of the witness, even though the witness himself admitted the fact; and it was in support of this right of the party to insist on the production of the record that the court said that a record could not be proved by the admission of any witness; that he might be mistaken as to what passed in court, &c. *Newcomb* agt. *Griswold* (24 *N. Y.*, 298), is to the same effect. There is nothing in these cases, or any other I have found, which holds that if, without objection from either witness or party, the fact is proved by parol and is not disputed, it can be disregarded. I have found no case presenting that question unless it be *Priddle's* case (*Leach, Cases in Crown Law, case No. 204*), where on a trial before BUTLER, J., the witness was

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asked on his examination on his *voir dire*, whether he had not been convicted of a conspiracy and sentenced to Newgate for two years. No objection appears to have been made to the mode of proof, and on his answering in the affirmative his testimony was rejected. In the present case it is quite apparent that there was no contest on the trial as to the fact of the witness being an unpardoned convict. It was substantially conceded, but the testimony was doubtless admitted on the ground that he was made a competent witness by section 832 of the Code, and if error was committed in that respect, the prisoner should not be deprived of the benefit of his exception to the reception of the testimony of the witness.

The judgment should be reversed and a new trial ordered.
All concur.

SUPREME COURT.

THE PEOPLE *ex rel*. JULIA A. SHAW agt. JOHN McCARTY *et al*.

Summary proceedings — Illegal trade — Landlord and tenant.

Where a tenant knowingly sublets a portion of the demised premises for a policy shop, the lease of the tenant may be annulled by the landlord, and the tenant may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an over holding tenant.

The principles laid down in same case reported in 59 Howard's Practice, 487, sustained.

First Department, General Term, October, 1881.

JULIA A. SHAW, as landlord, commenced summary proceedings against John McCarty, her tenant, to remove him and an under-tenant (who was also made a party to the proceeding) from the possession of a hotel in Forty-second street, near Fourth avenue, in the city of New York, upon the ground that they had violated the statute in reference to "illegal

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trades," in this, that the tenant McCarty had knowingly sublet a portion of the premises, to an under-tenant to be used as a "policy shop."

Upon the trial before justice LANGBEIN of the seventh district court, the proceedings were dismissed. The landlord thereupon obtained a writ of *certiorari* to review this adjudication, and at the same time commenced new proceedings before Mr. justice McADAM, of the marine court, who found for the landlord (*case reported*, 59 *How. Pr.*, 487). The proceeding had before justice LANGBEIN was then brought to a hearing in the supreme court upon the writ of *certiorari* granted to review them, and that court has reversed his adjudication in the following opinion :

E. P. Wilder, attorney for relator

Joseph Ullman, attorney for respondent.

DANIELS, *J.*—The proceedings were taken under the authority of chapter 583 of the Laws of 1873. The evidence given to support the allegations made by the relator very clearly show that the basement sublet by the lessee, McCarty, to Lampson as an under-tenant, was devoted to the business of a policy shop. That was not only established by the direct and positive statement of some of the witnesses, but in addition to that it appeared from what was stated to have been transacted there, and moreover it was not denied by the sub-tenant himself when he was examined as a witness upon the hearing. This may not have been an indictable offense under the law as it was constituted by the case of *People agt. Jackson* (3 *Denio*, 101), but still, if it was an unlawful business, it was within the terms of the act of 1873. That the business was unlawful and within the restraint of the statute prohibiting lotteries is plainly to be inferred from the manner in which it was transacted. According to the evidence of the witnesses who participated in it, they purchased certain num-

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bers, and as they were selected they drew certain amounts of money depending upon such numbers, or lost the money paid for them. What was bought and sold was the chance to obtain sums of money depending upon the numbers selected from those offered for sale. The sales made were those of chances to draw money. It was a device of chances, determinable by the successful or unsuccessful selection and purchase of numbers, and it was, therefore, within the terms of the statute prohibiting lotteries and rendering them unlawful (1 *R. S.* [*Edmond's ed.*], 617, 618, *secs.* 22, 27). To carry on such a business was plainly unlawful, as these terms have been made use of in the act of 1873. And that was sufficient to avoid the lease of the person carrying on this business. The fact that the tenant of the building sublet this portion of it with the assent of the owner of the property is not of the slightest importance. For the inquiry to be made is not whether the lease itself was authorized, but whether the demised premises were wholly or partially devoted to an unlawful business. If they were, then the lease may be annulled and the tenant removed, although the demise may, when it was made, have been formal and effectual. The evidence did not show that McCarty, the tenant of the entire building, knew that his subtenant was using the portion leased to him for an unlawful purpose, until the interview which took place between himself and James E. Shaw, on the 10th day of July, 1880. Then he was fully informed of the fact. But instead of taking immediate measures to put an end to the business, or remove the subtenant, he served notice upon him to vacate the premises occupied by him on the first day of the following August. That left Lampson at liberty to continue his occupation until that time. It was an implied license to him, which the evidence showed he availed himself of by carrying on his business until proceedings were taken by the relator, on the nineteenth day of July, to remove both McCarty and his subtenant Lampson from the premises. Whether the statute should be so construed as to include the lease of

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the entire building, when the unlawful use consists only of one apartment leased to a subtenant, is a point not now to be considered, for it was presented in the case of *People agt. Bennett* (14 *Hun*, 63), and there held to produce a forfeiture of the lease made to the tenant whose lessee appropriated the part of the building leased to him to carrying on an unlawful business. This case was brought within that authority.

The business carried on in the apartment of the subtenant was an unlawful one under the statute (*Hull agt. Ruggles*, 56 *N. Y.*, 424), and the proceeding was commenced after the tenant of the building had acquired knowledge of the unlawful nature of the business carried on by his under-tenant, and had made himself a party to it by substantially allowing its continuance for the ensuing period of three weeks. That was sufficient to make out the case, and, under the terms of the act of 1873, to entitle the relator to a warrant for the removal of these occupants from the premises. She had done nothing to deprive herself of the right created by the statute subject to which the lease of the property had been made by its owner. And the notice served by the tenant on his subtenant contemplating a subsequent period to which his tenancy might be continued, in no manner suspended or affected the right of the relator to terminate the lease and repossess herself of the premises. All that was required for that purpose was that the occupant and lessee of a part of the premises carried on an unlawful business in that part, and that his lessor, who was the tenant and lessee of the entire building, knew of that use, and made himself a party to it by permitting its continuance after he had acquired that knowledge.

These facts were established by the evidence, and the proceedings should not have been dismissed, but a warrant should have been issued to place the relator in possession. They must, therefore, be reversed, with costs to the relator.

DAVIS, Ch. J., and BRADY, J., concur.

Kelly agt. Newman.

N. Y. COMMON PLEAS.

CATHARINE KELLY agt. DANIEL NEWMAN and the
MAYOR, &c.

*Pleading — Complaint — Demurrer — Improper joinder of causes of action —
No answer to demurrer to say that such causes of action are not separately
stated.*

Where a complaint in an action against an individual defendant and the city to recover damages for injuries from a fall caused by accumulations of snow and ice upon the sidewalk in front of certain premises alleges that it was the duty of both defendants to maintain the sidewalk in front of said premises free from incumbrances of ice and snow, and also alleges that they permitted a cellar extending under the street to remain open:

Held (upon demurrer), that as two causes of action are set out in the complaint — one for permitting ice and snow upon the sidewalk, and the other for injuries sustained by plaintiff's falling into the cellar — and as the individual defendant is not, as matter of law, liable for accumulations of snow and ice, two causes of action are improperly joined.

It is no answer to the demurrer to say that such causes of action are not separately stated.

Special Term, October, 1881.

Hart & Price, for plaintiffs.

Koones & Goldman, for defendant Newman.

VAN BRUNT, J. — This is an action to recover damages against the defendant Newman and the Mayor, Aldermen and Commonalty.

The complaint alleges that the defendant Newman is the occupant of No. 681 Sixth avenue, in the city of New York. That it was the duty of both defendants to maintain the sidewalk in front of said premises in a safe condition for passers-by and free from all incumbrances of ice and snow, and that nevertheless the defendants, neglecting their duty, permitted ice and snow to accumulate upon said sidewalk.

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The complaint then further alleges that defendants, in violation of their duty, permitted a cellar beneath said premises, which extended and projected beyond the line of the street, to remain open, exposed, unprotected and unsecured, and that on the 10th of February, 1881, the plaintiff, while lawfully passing along the said sidewalk, without any fault or negligence on her part, slipped and fell upon said ice and snow and was thrown down the said cellar, whereby she was greatly injured, viz., to the amount of \$10,000. The defendant Newman demurs upon the ground of improper joinder of causes of action.

If the complaint contains two causes of action, the counsel for the plaintiff concedes that the demurrer is well taken.

If any liability exists or could exist against the defendant Newman because of the accumulations of snow and ice upon the sidewalk, certainly such a cause of action is set out against him in the complaint. It is true that it is claimed now by the counsel for the plaintiff that but one cause of action is set out in the complaint, viz., that for injuries sustained by her falling down the cellar; but this view an examination of the complaint does not sustain, as if the allegations in the complaint are true, viz., that there was a violation of duty which he owed the passers-by upon the part of Newman, in allowing ice and snow to accumulate upon the sidewalk in front of his premises — two causes of action are set forth in the complaint; and the drawers of the pleading undoubtedly then supposed that the defendant Newman did owe such duty, and that he became liable as well as the Mayor, &c., for its neglect. Such being the nature of the pleading, and there being no liability, as matter of law, upon the part of Newman because of the accumulation of snow and ice, two causes of action are improperly united; and it is no answer to the demurrer to say that such causes of action are not separately stated.

Demurrer sustained; plaintiff to have leave to amend upon payment of costs of demurrer.

Potter agt. Neal.

MONTGOMERY COUNTY COURT.

DAVID S. POTTER, plaintiff, agt. MICHAEL NEAL, defendant.

Tenants in common — Conversion — Right of one tenant in common of personal property to maintain trover against his cotenant — Objection to jurisdiction of county court — when it must be raised.

One tenant in common of personal property may maintain trover against his cotenant for his undivided one-half of such property.

Where the fact showed that the plaintiff was the owner of an undivided one-half of certain cattle, and that it was agreed as a part of the contract between the parties, that before the defendant moved away from the plaintiff's farm the cattle should be divided between them, and they should not be removed until divided, and that afterwards, when the defendant's contract was ended and his term closed for occupying the farm, against the demands and requests of the plaintiff to divide the stock and distribute it in accordance with their agreement, the defendant drove the stock away to another farm whereto he removed, and after repeated requests by the plaintiff to divide the stock or to account to the plaintiff, or pay him for his share, the defendant refused and denied all the plaintiff's right, interest or share in the stock, and denied that the plaintiff had any title to the stock to which he was entitled to a division, and locked up the stock in his barn and converted it to his sole use, benefit and purposes, in denial of all the rights title and interest of the plaintiff, and that the defendant intended thereby to prevent the plaintiff from having any right, title, interest or share in the cattle:

Held, that a case is made of such a conversion of the plaintiff's interest in the stock, such a destruction or loss of his rights and interests as would entitle the plaintiff to recover of the defendant in this action.

The objection that a county court has not jurisdiction over the person of the defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits.

November, 1880.

MOTION for a new trial on the minutes. Action in trover for the conversion of an undivided one-half of a quantity of cattle.

H. Dunkel and *F. Fish*, for plaintiff.

A. Hees and *McI. Fraser*, for defendant.

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ZERAH S. WESTBROOK, *County Judge*. — Defendant's motion at the opening of the trial to dismiss the complaint, on the ground that it does not show that the court has jurisdiction, by alleging that the defendant is a resident of the county, was properly denied.

He answered to the merits, noticed the cause for trial twice (and for the present term), and had it put over a former term for an absent witness. The objection therefore came too late. It was not taken either by demurrer or answer. The defect, if any, was waived. There would be some force in the objection if the complaint showed that the court did *not* have jurisdiction (*Holbrook* agt. *Baker*, 16 *Hun*, 176; *Dake* agt. *Miller*, 15 *Hun*, 356). The trial shows that defendant is a resident of the county.

There was upon the facts a valid sale to the plaintiff of an undivided one-half of the cattle in question. The agreement for the sale was not void by the statute of frauds. The agreement for the defendant to work plaintiff's farm on shares and for a sale of an undivided half of defendant's stock on the farm to plaintiff, I think, was an entire contract, and each part formed a good consideration for the other. The defendant took the plaintiff's farm under their contract, worked it on shares, used the cattle in question in connection therewith, and the proceeds of the farm and cattle during the year were divided according to the terms of the contract.

The defendant cannot, after receiving the profits and benefit of that part of the agreement most beneficial to him repudiate the sale as void. That would operate as a gross fraud upon the plaintiff, which no court of justice could sanction. There was, I think, a sufficient delivery and acceptance, and all that was necessary under the peculiar circumstances of the case. The parties intended to make a valid and effectual sale, and always acted with respect to the property in the belief that they had done so during the year defendant worked the farm under the agreement. The jury, I think, properly found that there was a valid sale upon the evidence.

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The most important question in the case is, whether the plaintiff can maintain the action against the defendant, his cotenant in common, for a conversion of the plaintiff's undivided one-half of the cattle? Whether the facts found will warrant a recovery for the conversion of the plaintiff's share? The case was put to the jury upon the strongest view that the evidence would warrant in favor of the defendant. They were charged that if they found that plaintiff was the owner of an undivided one-half of the cattle, and that it was agreed as a part of the contract between the parties that before the defendant moved away from the plaintiff's farm the cattle should be divided between them, and they should not be removed until divided, and that afterwards, when the defendant's contract was ended and his term closed for occupying the farm, against the demands and requests of the plaintiff to divide the stock and distribute it in accordance with their agreement, the defendant drove the stock away over to the Schenck farm, whereto he removed, and after repeated requests by the plaintiff to divide the stock or to account to the plaintiff, or pay him for his share, the defendant refused and denied all the plaintiff's right, interest or share in the stock, and denied that the plaintiff had any title to the stock to which he was entitled to a division, and locked up the stock in his barn and converted it to his sole use, benefit and purposes, in denial of all the rights, title and interest of the plaintiff. And if they found all those facts, and that the defendant intended thereby to prevent the plaintiff from having any right, title, interest or share in the cattle, then a case would be made of such a conversion of the plaintiff's interest in the stock, such a destruction or loss of his rights and interest as would entitle the plaintiff to recover of defendant in this action.

The jury have found all those facts, and they are fully sustained by the evidence.

I was of opinion at the trial that these facts would render

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the defendant liable, and subsequent examination and consideration of the question have strengthened that view.

In *Van Doren* agt. *Balta* (11 *Hun*, 239), the plaintiff was present at the sale of a wagon under a mortgage made by his cotenant thereon, and forbade the sale in the hearing of defendant, who then purchased the chattel. The defendant Balty thereafter held possession of the property and used it for his own individual purposes, claiming to own it exclusively, and denying that the plaintiff had any interest therein, and refused to deliver to plaintiff on demand.

It was therein held that the one tenant in common, by undertaking to sell the whole property, made himself liable to his cotenant for a conversion of the latter's share, and that the purchaser at the sale became only a cotenant with the plaintiff. And that "as the sale of the plaintiff's share was a wrong to the plaintiff, for which the seller is liable, it follows that the defendant who participated in it by purchasing the whole with notice of the plaintiff's rights, and thereafter asserting an exclusive title to the property, is equally liable as a wrong-doer, and plaintiff may maintain an action against him for the conversion of his share."

It seems to me that the principle decided in that case is applicable to the case here. The defendant Neal has done more to deprive the plaintiff Patten of his share in the cattle than was done by the defendant Balty in that case.

In *Osborne* agt. *Schenck* (18 *Hun*, 202), plaintiff brought an action against defendant for the conversion of an undivided one-half interest in a planing machine. One Pratt, Osborne's cotenant, had executed to Schenck a mortgage on the whole machine, which he accepted, but did nothing more. It was held therein that Osborne's cotenant became liable to him by assuming to mortgage the whole, but Schenck had done nothing unlawful or that would render him liable. And LEARNED, P. J., in his opinion, puts the decision on the ground that "the mere mortgaging of the planing machine was not a conversion. It does not appear that it was intended to be a

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denial of the plaintiff's rights, and it was accompanied by no act which in any way disturbed or molested his claim." And that there was no demand and refusal to deliver and assertion of an exclusive right.

This latter case was affirmed in the court of appeals. Opinion by FINCH, J. (not yet reported).

Judge FINCH, in a learned and interesting opinion in that case, takes the same view as the general term, and puts the affirmance on the same grounds. He says: "There is no evidence that he (Schenck) used it. No demand was made of him before the action was brought. He neither did or said anything in denial of plaintiff's rights as a cotenant until after he was sued. He asserted no exclusive dominion over it. That assertion was not made until driven to an answer after action commenced for a conversion, and even then was not urged or intimated upon the trial. The defense was rested wholly and alone upon the right of the defendant as a cotenant."

It will be seen that the facts were not in the case of *Osborne agt. Schenck*, that are strongly proven in this case, and which judges LEARNED and FINCH both, in their opinions, clearly intimated would sustain the action.

In the case of *Swartwout agt. Evans* (37 Ill., 442), one of two joint owners of a mowing machine sued the other in trover. And it was therein held that the action would be for the conversion of an undivided half on proof that the cotenant assumed and exercised exclusive ownership, repudiating the rights of the other. To the same effect is *Grove agt. Wise* (39 Mich., 139).

In the case of *Ripley agt. Davis* (15 Mich., 75) plaintiff sued to recover the value of two-fifths of a quantity of logs cut by defendant on plaintiff's premises, and which were to be boomed at a certain point and divided. Defendant took the logs beyond the place agreed upon, and set up a claim to them under an alleged purchase.

Held (COOLEY, J.), that the action for conversion could be maintained.

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MARTIN, Ch. J., in a concurring opinion, held that the defendant's acts showed an intention to convert the property, which was sufficient.

The great difficulty ordinarily in sustaining an action of trover in favor of a tenant in common of personal property against his cotenant is, that each tenant has the right to the possession of the whole, and the mere possession and use of the whole by one will not constitute a conversion. But the facts in this case clearly constitute a conversion upon principle and authority. The defendant has attempted and intended to deprive the plaintiff of his share in the cattle. All his acts were tortious.

It may be urged with great force that the defendant's wrongful acts have terminated the cotenancy, and the plaintiff may so regard it and recover of the defendant for the wrong.

I discover no errors in the case calling for correction. The verdict is well sustained and is entirely just.

The motion for a new trial is denied, and judgment for the plaintiff ordered upon the verdict in his favor.

N. Y. COMMON PLEAS.

CHARLES DEVLIN, respondent, agt. The MAYOR, &c., of the city of New York, appellant.

Reference—Effect of death of referee—Power of court to increase number of referees.

Where a cause is referred by consent of parties, and the referee dies, it puts an end to the reference, because the extent of the consent is that the cause may be tried and decided by the particular person whom they have agreed upon as a referee.

But where the cause is referable in its nature, and has been referred by the court, upon motion, the only effect that the death of the referee before the termination of the reference has is, that nothing has been

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accomplished, and that a new referee must be appointed, before whom the trial of the cause has to be begun again.

After the trial has commenced before the substituted referee, the court has power, on motion, to increase the number of referees to three.

General Term, November, 1880.

T. C. Cronin, for respondent.

Wm. O. Bartell, for appellant.

DALY, *Ch. J.*—Where a cause is referred by consent of parties and the referee dies it puts an end to the reference, because the extent of the consent is that the cause may be tried and decided by the particular person whom they have agreed upon as a referee. But where the cause is referable in its nature and has been referred by the court, upon motion, the only effect that the death of the referee before the termination of the reference has, is that nothing has been accomplished and that a new referee must be appointed before whom the trial of the cause has to be begun again.

A motion was made in this cause that it be referred. The motion was resisted by the defendants upon the ground that it was not a referable case, but involved questions that ought to be tried by a jury.

The judge at special term held otherwise and appointed a referee. The defendants appealed to the general term where the order was affirmed upon the ground that the action was referable, and we are informed that the court of appeals have recently affirmed the decision of the general term, so that it is settled beyond any further question that the cause is referable and that the plaintiff is entitled to have it referred as a matter of right.

The fact of the death of the referee can in no way affect this decision, which is the law of this case as settled by the court of final resort. The case has to be tried and the plaintiff is entitled to have it tried by a referee involving as it

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does a great number of items, the evidence on the former trial relating to which filled several printed volumes.

To require, because the referee is dead, that a motion for a reference must again be made would be to require an idle ceremony, as the same decision would have to be made again that was made before.

The proper course, therefore, was the one pursued — to apply to the court for the appointment of a new referee — and the order made by the judge at the special term was a proper one, and should be affirmed.

This asked that if we should come to this conclusion we should direct that the number of referees should be increased to three. But the defendants are here in error. If they wanted three referees they should have made the application to the judge at the special term that they do now upon this appeal, and for all that we know the judge might have granted this request.

In my opinion, from what I know of this case, in view of the questions that have to be passed upon and the large amount involved, the application, on the part of the city, that it should be tried by three referees instead of one, is a reasonable application. But that is a matter upon which the plaintiff has a right to be heard. It should have been applied for on the motion below, and, if it is to be allowed now, it can only be by motion, upon which the plaintiff may have an opportunity to be heard. It is in the power of the court to grant it, notwithstanding the order already made upon facts brought before the court showing its necessity or propriety, and of which the plaintiff have notice by a regular motion upon which he has the opportunity, if he wishes, to read affidavits in opposition. It is not a matter to be granted by an appellate court. All that we can do is to affirm or reverse, in whole or in part, an order appealed from.

The order below should be affirmed.

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CHARLES DEVLIN agt. The MAYOR, &c., of the city of
New York.

Notice of judgment — what is sufficient notice to limit time to appeal.

Where a paper, which bears on its back an indorsement of the title of the cause and statement that it is a copy, "certified order affirming order of reference," to which is inscribed the name of the attorney for respondent with the number of his office, and is addressed to and served on the attorney for appellant, and upon the face of the paper appears the certificate of the clerk of common pleas that the paper is an extract from the minutes of the court, and that it is a copy of an order made at the general term of the court:

Held, that these statements show that the order has been entered, and entered in the office of the clerk of common pleas, and is such a written notice of judgment as will limit the time to appeal.

Special Term, November, 1880.

T. C. Cronin, for plaintiff.

W. C. Bartlett, for defendant.

VAN HOESEN, *J.* — The paper served on the 3d of April, 1877, upon the corporation counsel, bears on its back an indorsement of the title of the cause and statement that it is a copy, "*certified order affirming order of reference*," to which is inscribed the name of T. C. Cronin, attorney for respondent Donaldson, 167 Broadway, and it is addressed to William C. Whitney, Esq., corporation counsel. Such is the indorsement on the paper. Upon the face of the paper appears the certificate of the clerk of common pleas that the paper is an extract from the minutes of the court, and that it is a copy of an order made at the general term of the court. The order is set out in *totem verbis*. These statements show that the order has been entered, and entered in the office of the clerk of the court of common pleas. The Code of Pro-

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cedure requires nothing more. The paper served was in my opinion "a written notice of the order," which is all that section 332 of the Code of Procedure required. It is free from the defects which in *York agt. Peck* (17 *How.*, 192); *Valtun agt. W. L. F. Ass. Co.* (19 *How.*, 515), and in the other cases cited in the books on Practice were held to make the notices in these cases insufficient. Under the decision of *Fry agt. Bennett* (16 *How. Pr.*, 402), which is a thoroughly considered case, the notice given to the corporation counsel on April 5, 1877, was sufficient. The appeal is therefore too late, and the motion must be denied.

SUPREME COURT.

MARIE ANTOINETTE WITHAUS agt. FREDERICK C. C. SCHAACK.

Deed—when its execution by a wife, through the misrepresentations of her husband, is void as to her dower rights—Negligence in executing papers without reading.

The plaintiff, a married woman, executed without examination a trust deed with her husband to secure certain of his creditors, upon his representation that it was a conveyance, in form and substance, such as he had previously represented to her it would be, and to which she had assented, the fact, however, being that the deed included lands other than those he had proposed to convey and to which she had agreed :

Held, that the deed, in so far as it affected the dower rights of the wife in such other lands, is inoperative and void, and that her rights remained the same as though she had not executed the deed.

Also, that negligence is not to be imputed to the plaintiff in signing the deed without examination as to its contents, in reliance upon the representations of her husband (*See S. C.*, 57 *How. Pr.*, 310).

Special Term, October, 1881.

TRIAL of issues of fact.

John E. Burrill, for plaintiff.

Lewis Sanders, for defendant.

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VAN VORST, *J.* — The plaintiff has distinctly testified to certain statements and representations made to her by her husband to induce her to agree to an arrangement he was about to make with certain of his creditors by which, through appropriate conveyances to be made, a portion of his land in the city of New York would be devoted to secure such creditors. She assented to the arrangement. When the deed was presented for her signature, according to her testimony, he represented that it was an instrument which he had caused to be prepared in furtherance of the purpose he had before disclosed to her, by which certain of his real estate was to be devoted to the payment of specific debts.

The creditors who were to be provided for, and the general nature of their claims, had been stated by him to her, as had been the facts, that the property to be conveyed and to which her assent was asked, was to be confined exclusively to the lands owned by him, north of Fifty-ninth street, in the city of New York.

To this arrangement the plaintiff had assented. And when the deed was presented for her signature her husband informed her that it was, in form and substance, such as had been proposed by him. Without reading the paper and relying upon her husband's statements, she executed the same, and it was delivered to the grantee, who is the defendant.

It now appears that, instead of being limited to a conveyance of land lying north of Fifty-ninth street, it embraces property south of that line.

Had the plaintiff read the paper before signing it, she would have readily discovered the error in the description. But she relied, as she has testified, upon her husband's statements, and in such reliance I am persuaded that she was justified. It is no evidence of negligence or want of care for a wife, under the facts and circumstances of this case, to place confidence in the statements of her husband and relax the vigilance and close examination which obtains in dealings

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with strangers. If a woman may not trust her husband in such a matter, I know not on whom she could rely.

In granting the relief which must be awarded in this action, it is not necessary to pronounce the conduct of the plaintiff's husband fraudulent. There is no reason to suppose it was such. From all that appears he was an honorable man, and in the possession of his reason would have scorned an act of duplicity. But he was afflicted with a disease liable at any time to affect his reason. He was, at the time, anxious and greatly distressed about his debts, which he sought to secure, especially such as were of a fiduciary character.

There is enough in the evidence to justify the conclusion that his mental condition was unsound, and that his conduct is not to be judged by the same standard which is applied to the acts of men in a normal condition of physical and mental health.

Shortly after this transaction he gave clear and unmistakable evidence of insanity, and he was removed to an asylum for the custody of such patients, and where, by his own hands, he put an end to his life.

The plaintiff's case rests entirely upon her own evidence, but uncontradicted and unimpeached I cannot disregard it. I discover nothing in the case which would justify me in regarding it as untruthful, or in setting it aside as unworthy of acceptance.

The argument of the learned counsel for the defendant, based upon the improbability of the plaintiff's statements, is answered by the mental condition of her husband, which exonerates him from intentional wrong. Plaintiff interposed her claim with reasonable diligence, and appears to have persisted in it.

I do not think that the plaintiff's conduct after the execution of the instrument, in taking a conveyance and paying for the Sixth avenue property, and in procuring an assignment of the Renolds claim, amounted to a ratification of her act in signing the deed. The object and purposes of such

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acts prevent their operation as an estoppel to the assertion of her equitable rights. In addition, the defendant and those whom he represents under the trust deed, are not *bona fide* purchasers for a valuable consideration.

The opinion of the general term, by BRADY, J., settles that question. The deed was intended to secure the payment of obligations already incurred, and I cannot see that the plaintiff has done, or omitted to do anything to the injury of the defendant or the beneficiaries under the trust deed which should debar the assertion of a right to relief against her act in executing the deed. There are other particulars in which the deed differs from what it was represented to be, but the cause above, particularly specified, affords a sufficient reason in itself for granting the only relief which is open to her.

The property both north and south of Fifty-ninth street belonged to the plaintiff's husband, and he might devote the same to the purposes mentioned in the trust deed. The plaintiff's assent was not necessary to the validity of the action of her husband, only as it affected her inchoate right of dower.

That right should be both respected and preserved, notwithstanding her execution of the deed.

In so far as plaintiff's dower rights are concerned in the property south of Fifty-ninth street, the execution of the conveyance by plaintiff should be adjudged to be null and void ; but as a conveyance of all the property both north and south of Fifty-ninth street by the plaintiff's husband, for the purposes mentioned in the trust deed, it is valid and unaffected by this decision.

Whether the plaintiff's husband in fact owed the defendant and Ida Mommer the amounts secured by the instrument of trust is not a proper subject for adjudication here ; that is a matter in which the creditors of the creator of the trust are concerned, and they are not before the court.

The plaintiff is not entitled to relief on that account in this action other than that above mentioned.

There is nothing to show that the defendant made any

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representations or statements, or did any act to induce the plaintiff to sign the deed, and as far as he is concerned he is blameless of the error or mistake under which she executed the same.

There must be judgment in the plaintiff's favor to the extent above indicated, with her costs to be paid out of the funds in the defendant's hands, growing out of the trust deed.

COURT OF APPEALS.

PEANE BRUMMER agt. JACOB COHEN.

Insurance (Life)—Non-assignability of endowment policy upon life of husband for benefit of wife—Laws of 1840, chapter 277.

An endowment policy on the husband's life, payable on a certain date to the wife or her personal representatives, is within the act of 1840, and therefore subject to the rule of non-assignability. (*Affirming S. C., 58 How., 239.*)

Decided October, 1881.

ACTION to compel the reassignment to the plaintiff of a policy of insurance on her husband's life, which policy plaintiff had previously assigned to defendant as collateral security for a loan or loans of money to her said husband.

The policy was issued by the Mutual Life Insurance Company of New York, May 12, 1868. In consideration of \$687.30, recited to have been paid by Peane Brummer, wife of Aaron Brummer, and of the annual payment of a like amount on or before May twelfth in every year during the continuance of the policy, the company assured the life of Aaron Brummer in the amount of \$10,000, and agreed to pay that sum to the said Peane Brummer or her executors, administrators or assigns, on the 12th day of May, 1883, or, should he die previously thereto, in sixty days after due notice and

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proof of his death, to her or her executors, administrators or assigns.

The premiums were changed from annual to semi-annual payments of \$357.40, payable May twelfth and November twelfth in each year. This change was made on May 11, 1874.

All the premiums were paid by the husband, as far as premiums were paid, in cash. At a certain period the dividends which the policy had earned were, by consent of the company, applied to the payment of premiums.

There are children living of the marriage, and such children were in being at the time the defendant took the assignment from Mrs. Brummer.

Two questions were litigated at the trial — the assignability of the policy, and whether all the advances intended to be secured by the assignment had been repaid.

The court of common pleas, J. F. DALY, J., gave judgment for the plaintiff (*see* 57 *How.*, 386), which was affirmed by the general term, LARREMORE, J. (*See* 58 *How.*, 239).

A Blumenstiel, for plaintiff.

David Leventritt, for defendant.

ANDREWS, J. — This case is governed by the decision in *Eadie* agt. *Slimmon* (26 *N. Y.*, 9). The contention that to bring an insurance by a wife upon the life of her husband within the operation of the act of 1840, it must appear from the terms of the policy, or must be shown by extrinsic evidence, that it was the intention of the assured to avail herself of the provisions of the act, cannot, we think, be maintained. The right of a wife to insure the life of her husband was not given by that act. She had, at common law, an insurable interest in her husband's life (*Reed* agt. *Royal Ex. Ass. Co.*, *Peak Ad.*, *Clas.*, 70; *Lord* agt. *Dall*, 12 *Mass.*, 115; *Loomis* agt. *Eagle Ins. Co.*, 6 *Gray*, 396; *Connecticut Mut. Ins. Co.*,

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agt. *Schaefer*, 94 U. S., 457). The amount insured must necessarily be the measure of damage in case of his death. The pecuniary interest of a wife in her husband's life is incapable of exact measurement. The insured, by issuing a policy to the wife, agrees that her interest is at least equal to the sum insured, and the policy is in the nature of a valued policy, and the full amount insured is recoverable in case of death, without proof of actual damages.

Nor did the provision in the second section of the act of 1840 — that the insurance by a wife on the life of her husband may, in case of her death before the decease of her husband, be made payable to her children — confer any new power or authorize a contract which before the statute would be unauthorized. There does not seem to be any ground to doubt that before the statute a provision in a life policy issued to a wife on her husband's life that in the event of her death before the death of her husband the policy should inure to the benefit of her children would be entirely valid and enforceable. But the act of 1840 did secure to the wife the sole benefit of an insurance on the life of her husband, procured by or for her and in her name, in case she survived her husband, free from any claim by him or his representative or by his creditors, subject to the limitation that the annual premium paid should not exceed a specified sum.

In this respect the act of 1840 is enabling and not declaratory. The act does not require that it should appear by the policy that it was issued under the act, in order that the insured should have the benefit of its provisions. There are no restrictive terms. The act is remedial and was passed for the benefit of married women and their children, and the intention of a married woman insuring the life of the husband to avail herself of its provisions is inferable from its beneficial nature. In *Eadie* agt. *Slimmon*, the policy did not refer to the act, although it might perhaps be fairly inferred that the parties had the act in view from the fact that it incorporated substantially the language of the second section, in

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providing for the payment of the insurance to the children in case of the death of the wife before the decease of her husband. But in *Wilson agt. Lawrence*, affirmed in this court (76 *N. Y.*, 585), the policy made no reference to the act; nor did it make any provision for children. It was, aside from the endowment feature, substantially like the policy in this case. It was held that the policy was subject to the act of 1840, and unassignable within *Eadie agt. Slimmon* and other cases. The learned judge who delivered the opinion at general term, in considering whether the policy was subjected to the act of 1840, and in answer to the suggestion upon the subject that it made no provision for children, remarked that it did not appear that there were children of the marriage. But this circumstance seems to me to be immaterial where the question is as to the wife's power to assign her interest. The act as amended expressly provides that the insurance may be made payable, in case of the death of the wife before the insurance becomes due, to the husband or to his or their children as may be provided (*Laws of 1862, chap. 70; Laws of 1866, chap. 656*). The omission to provide for the devolution of the fund or claim in the contingency of the wife's death before the death of her husband, or, as in this case, the deliberate statement in the application in answer to the question, For whose benefit is the insurance to be effected? that it was for the benefit of the wife, and the striking out of the words "and her children," does not, we think, relent the presumption that the wife, in taking the policy had in view the act of 1840. But we do not mean to decide that extrinsic parol evidence, showing that the insurer and insured did not intend to make the policy subject to the act of 1840, would be allowable to control the legal effect of the contract. That question can be determined when it arises.

It is claimed that the policy in question is not within the act of 1840, and is not, therefore, subject to the rule of non-assignability established in *Eadie agt. Slimmon*, for the reason that it is an endowment policy — that is, a contract by

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the insured in the alternative, in consideration of the payment by the insured of an annual premium, to pay the sum insured at the expiration of a term of years, or on the death of the husband at any earlier period. The husband insured by the policy in this case is still living, and the period has not arrived when the obligation of the insurer to pay has become absolute; and it is insisted that the assignment of the wife sought to be annulled in this section was valid, so far at least as to convey her contingent interest, in the event of the husband surviving the time when the policy becomes absolutely payable. This contention is based on the claim that only contracts for life insurance strictly — that is, insurance payable in the event of death — are within the purview of the act of 1840, and that the reason assigned in *Eadie* agt. *Slimmon*, for holding that policies of life insurance payable to wives are non-assignable, is that the legislature had in view the protection of widows and orphans who would or might be frustrated if a wife was permitted to assign the policy during her husband's life; that this reason has no application to the endowment feature of a life policy which contemplates the maturity of the contract during the husband's life. There is considerable force in the argument that an endowment policy was not in the mind of the legislature when the act of 1840 was passed. The original act provides that "a married woman may cause her husband's life to be insured for her use for any definite period, or for the term of his natural life;" and further provides that the insurance shall be payable to her "in case of her surviving her husband," and refers to no other event upon the happening of which she is entitled to receive it. It seems reasonable, therefore, to suppose that the words "any definite period" in the original section referred to an insurance for a limited period, but, nevertheless, to an insurance payable only in the event of death. This construction justifies the remark of DENIO, J., in *Eadie* agt. *Slimmon*, that the statute "looked to a provision for a state of widowhood and for her orphan children." The policy in

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that case was issued in 1852. But the act of 1840 was amended by chapter 656 of the Laws of 1866, by striking out the words in the first section of the original act, which made the insurance payable to the wife "in case of her surviving her husband," and inserting in their place the words "in case of her surviving such period or term." This amendment seems to have been intended to bring within the act insurance of the precise character of the one in question.

An endowment policy is an insurance into which enters the element of life. In one aspect it is a contract payable in the event of a continuance of life; in the other, in the event of death before the period specified. The amendment of 1866 entitles the wife to the insurance whenever she survives the period or term of insurance, and her right is not limited, as in the act of 1840, alone upon the event of her surviving her husband, and seems to contemplate as well the case of an insurance payable before the death of the husband as one payable on his death. We are of opinion that the principle of non-assignability in *Eadie agt. Slimmon* applies to this case.

The statute, as it now stands, makes provision as well for wife and children, the husband living, as for widow and orphans, and there is no ground for imputing a different legislative policy in respect to an insurance payable during the husband's life and one payable only on his death.

We are not called upon to indicate the doctrine of *Eadie agt. Slimmon*. The inference of a legislative intent to make a policy procured by a wife on her husband's life unassignable deduced by the court in that case, has sometimes been thought to rest on a slender foundation; but the case has been repeatedly followed (*Barry agt. Eq. Life Ass. Co.*, 59 *N. Y.*, 587; *Barry agt. Brune*, 71 *id.*, 262; *Wilson agt. Lawrence*, 76 *id.*, 585).

The legislature, in conferring by subsequent acts a limited power of assignment, have recognized the policy attributed to the legislation of 1840, chapter 821, Laws of 1873, chapter

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248, Laws of 1879. The assignment in this case was not within the authority conferred by those acts.

The fact that the premium paid may have exceeded the sum limited in the statute presents no question between these parties.

We think the judgment is right and should be affirmed.

All concur.

U. S. CIRCUIT COURT.

EMMA A. FLEMING agt. THE NORTHAMPTON NATIONAL BANK.

Banks -- liability of, for stolen collaterals -- burden of proof as to negligence -- when court should direct a verdict instead of submitting questions to the jury.

Banks who have in their possession collateral security for the payment of loans are called upon to take the same care that good business men or persons or corporations of their class ordinarily take of such bonds. They are liable for want of ordinary care.

The burden of proof is on plaintiff to prove negligence, and failing to meet such burden plaintiff cannot recover.

Although there may be found fragmentary evidence in favor of the party upon whom the burden of proof is imposed, yet if the testimony, assuming it to be true, and the inferences which may fairly be drawn therefrom are, in the opinion of the court, entirely insufficient to authorize the jury to find a verdict in favor of the party upon whom the *onus* of proof is cast, it is the duty of the court to direct the jury what verdict to render.

Negligence is not necessarily a question for the jury, and when the evidence is too slight to justify a verdict in favor of plaintiff, the court should direct a verdict in favor of the defendant.

Southern District of New York, November, 1881.

PLAINTIFF'S assignor had United States bonds on deposit with defendant as collateral for a loan. The bank was robbed by masked burglars of funds and securities to the value of \$1,400,000, among which were these bonds. Plaintiff

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brought a test case as for conversion, and was allowed finally to rest her case on the question of negligence. Plaintiff's testimony showed that the bank watchman left the bank at four A. M., which was three hours before daylight at the season of the robbery, and also showed that the cashier, upon being threatened, had given up to the burglars the combinations of the vaults so far as he knew them. Prior to that a treacherous employe of Herring & Co., the manufacturers of the bank's vaults, had taken wax impressions of the keys of the vaults at a time when the employe was allowed access to its vaults by the bank for the purpose of repairs. The bank claimed to have acted in good faith and with proper care.

Peckham & Tyler, for the bank, moved for a nonsuit at the end of plaintiff's testimony.

SHIPMAN, *J.* — It is now well settled that, although there may be found fragmentary evidence in favor of the party upon whom the burden of proof is imposed, yet, if the testimony, assuming it to be true, and the inferences which may fairly be drawn therefrom are in the opinion of the court entirely insufficient to authorize the jury to find a verdict in favor of the party upon whom the *onus* of proof is cast, it is the duty of the court to direct the jury what verdict to render. This rule does not imply that the court should weigh the credibility of opposing witnesses, or determine whether the uncontradicted witnesses are to be credited; but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, the court is to determine whether there is any substantial evidence which can justify a verdict in favor of the party in whose favor the evidence is offered or received.

Now, in this case these bonds were left by Mr. Fleming with the Northampton bank as collateral security for the payment of a loan. It is in proof, or sufficiently in proof, so that there can be no doubt upon the subject that these bonds,

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together with a very great amount of other bonds and valuable personal property, were taken by robbers from this bank on the morning of the 26th of January, 1876, and by superior force, in the absence of any of the officers or the watchman of the bank; that subsequently this note matured; that payment was tendered and refused, and that demand was made for the bonds.

Now, what is the law upon the subject of bailees of collateral securities? The law is that banks who have in their possession collateral security for the payment of loans are called upon to take the same care that good business men, or persons or corporations of their class, ordinarily take of such bonds. That is, in the old phrase of the law, they are liable for want of ordinary care. It is proper, as was stated by the court in the case of *Essex Bank* (17th Mass.), that higher obligation of care should be imposed upon banks, which have a very large amount of property and assets, than should be imposed upon private individuals, and therefore I use the phrase, "Good business people of their class who deal in sureties of this sort and who hold securities of this sort." This being so — the state of the facts being, as I have stated, that the property was taken from them by superior force — there is an obligation upon the plaintiff to prove in some way lack of ordinary care; and if he does not prove it, then he has not made out his case. The only proof in this case of any consequence, as it seems to me, is that there was no watchman present; that the watchman went away at four o'clock. This man watched this as well as the other banks in the neighborhood, going on at ten o'clock at night and leaving at four o'clock the next morning. That fact would seem to me to be very slight evidence from which to infer negligence or want of ordinary care, and so slight that a jury would not be justified in finding a verdict for the plaintiff upon that fact alone. It is the important fact which is here presented. I think there is no case made out by the plaintiff, and I therefore direct a verdict for defendant.

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SUPREME COURT.

WOONSOCKET RUBBER COMPANY agt. RUBBER CLOTHING
COMPANY.

Extra allowance — to be allowed both upon the amount of the recovery and the amount of the counter-claim — Code of Civil Procedure, section 3253.

In cases concededly difficult and extraordinary, section 3253 of the Code of Civil Procedure will authorize an extra allowance to the plaintiff not only upon the sum recovered in the action, but upon the basis of the defendant's counter-claim determined against him.

Special Term, November, 1881.

MOTION for allowance.

George B. Ashley, for the motion.

Reynolds & Stearns, opposed.

POTTER, J. — This is a motion for an extra allowance upon a recovery upon the claim set out in the complaint, and also upon a counter-claim set forth in the defendant's answer arising out of an alleged breach of warranty in regard to a certain portion of the goods sold by plaintiff to defendant, and which were sent to and received by the defendants at San Francisco, amounting to some \$6,000.

The trial involved the labor of proving the sale and delivery of goods amounting to between \$600,000 and \$700,000, and extending through several years and embracing a great number of transactions.

The defendants concede it was a difficult and extraordinary case, and that plaintiff is entitled to an extra allowance upon the sum recovered in the action under section 3253, Code Civil Procedure, but the defendants contend that plaintiff is

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not entitled to an allowance upon the counter-claim which was defeated.

The case being concededly difficult and extraordinary, the only question is whether section 3253 will authorize an allowance to the plaintiff upon the basis of this defendant's counter-claim determined against him.

I am referred to no adjudicated case upon this point, but I am inclined, both from the language and the reason of that section, to hold that plaintiff is entitled to an allowance upon both the amount of the recovery and the amount of the counter-claim in this action.

The language is: "The court may award, in its discretion, to any party, a further sum, as follows: * * * a sum not exceeding five per centum upon the sum recovered or claimed."

The words employed — "recovered" and "claimed" — are equally applicable to recoveries by the plaintiff and by the defendant, and so of claims made by plaintiff and by defendant.

Under the provisions of law as they now exist (intended to avoid a multiplicity or circuitry of actions), a claim by the plaintiff against the defendant and a claim by the defendant (called a counter-claim to characterize it) against the plaintiff, may be embraced and determined in one action. This authorizes, and may produce, in favor of either the plaintiff or defendant, a recovery.

If the plaintiff has a recovery against the defendant, it must determine these facts — that the plaintiff established a claim against the defendant and that defendant had no counter-claim, or that plaintiff's claim exceeded the defendant's counter-claim.

If the defendant has a recovery against the plaintiff, it establishes these facts in the action, that the defendant had a claim against the plaintiff and that plaintiff had no claim against the defendant, or that defendant's counter-claim exceeded plaintiff's claim.

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In these actions, embracing both claims and counter-claims, the plaintiff is defendant as well as plaintiff, and defendant is plaintiff as well as defendant.

The two words "claim" and "recovery" embrace every determination in actions at law.

If the plaintiff has a claim against the defendant and the defendant has no counter-claim, the plaintiff's recovery is the measure of his claim on which to base his allowance. If the plaintiff fails in such a case and there is no recovery, then the plaintiff's claim forms the basis of the defendant's allowance.

If the case embrace both claims and counter-claims, and the claims of both are proved, then the recovery establishes amount of excess of the claims of the one over the claims of the other, and forms the basis of the allowance to be made to the party having such excess.

An allowance in such a case upon the recovery is equivalent to an allowance upon the plaintiff's claim and an allowance upon the defendant's counter-claim. The recovery represents the difference between such allowances. The scheme thus far is in effect an allowance upon the claim of both plaintiff and defendant established or defeated.

Why should not the same principle be applied to the remaining class of cases — viz., the class where the plaintiff establishes his claim and defeats the defendant's counter-claim? Manifestly it should be applied, and, if applied, the plaintiff is entitled to an allowance upon his claim which was established, and also upon the defendant's claim which was defeated.

The rule was evidently intended to reward or compensate the party who, in a difficult and extraordinary case, established or defeated a claim.

I think the case of *Vilmer agt. Scholl* (61 N. Y., 571), while its facts are not altogether like the facts in this case, yet recognizes the rule for which plaintiff contends.

That was a case of claim and counter-claim, and a recovery

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had by the defendant for a sum larger than the plaintiff's claim. The court held that the amount of the plaintiff's claim was not the basis of the defendant's allowance.

My conclusion is that the plaintiff is entitled to an extra allowance of five per cent, based upon the plaintiff's recovery, \$2,221.19, and upon the defendant's counter-claim of \$6,000, aggregating \$8,221.19. Order accordingly.

SUPREME COURT.

WILLIAM WARD, appellant, agt. MARGARET REYNOLDS *et al.*,
respondents.

*Parties in interest—who are—Code of Procedure, section 111—Action by
grantee of land held adversely.*

Where an action is brought for the recovery of real property by a grantee in the name of the grantor, under section 111 of the Code, against parties holding and claiming title adversely, and pending the action the grantee dies, such action may be continued with leave of the court in the name of the decedent's grantee or devisee, and for his or her benefit.

First Department, General Term, October, 1881.

APPEAL from order of the special term denying motion for leave to continue the above entitled action.

Ladislav Karge, for plaintiff.

Frederick Smyth, for defendant.

DAVIS, *P. J.*—This action was brought for the recovery of real property by and on behalf of one Henry Bretzfield in the name of William Ward, his grantor, against the respondents, who were in possession of the property, claiming to hold the same adversely at the time of the execution of a deed thereof from William Ward to said Bretzfield, and is claimed to be brought in conformity to the provisions of sec-

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tion 111 of the Code. Upon an order requiring the attorneys to produce their authority for bringing the action, the facts were presented by affidavit to the court, and the court at a special term, in July, 1880, held the authority sufficient and vacated the order. Afterwards Henry Bretzfield died leaving a last will and testament, whereby he devised all his estate to his widow, Mary Bretzfield, and appointed her and two other persons his executrix and executors. Mrs. Bretzfield as devisee under said will applied for leave to continue the action, and her motion was denied by the special term. From such denial an appeal is brought. The appeal is brought in the name of William Ward, the plaintiff on the record, and the point is made that it is not brought on behalf of Mrs. Bretzfield, but in the name of a party who is not injured by the order. This point, we think, is not well taken. If a legal right existed to bring the action in the name of William Ward, he is to be regarded, for the purpose of proceedings in the action, as a party in interest. The action did not abate by the death of Henry Bretzfield, but continued to exist for the benefit of the party who succeeded to the title or interest held by the deceased. The deed of Ward, as between himself and his grantees, was good, and conveyed all of the grantor's right, title and interest in the premises. It was only void as against parties holding and claiming title adversely, and in such a case an action to recover may be maintained by the grantee in the name of the grantor (*Code of Procedure, sec. 111; Hamilton agt. Wright, 37 N. Y., 502; Lowber agt. Kelly, 9 Bos., 502; Hasbrouck agt. Bunce, 62 N. Y., 483*). The action in that form may, doubtless, be continued, with leave of the court, in the name of the decedent's grantee or devisee for his or her benefit. The motion was, therefore, a proper one, and ought to have been granted by the court below. The order should be reversed, with ten dollars costs, besides disbursements, and an order entered permitting the continuance of the action by the appellant, on her complying with the requirements of the practice in such cases.

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SUPREME COURT.

JEFFERSON NEW, appellant, agt. SAMUEL ALAND, respondent.

Appeal — An order of county court granting motion to amend answer appealable — Order permitting defendant to serve amended answer setting up such defenses as he shall be advised, &c., is erroneous — Code of Civil Procedure, section 723.

An order of the county court granting a motion to amend an answer under section 723 of the Code of Civil Procedure, affects "a substantial right," and is appealable (*See Bowen agt. Widner*, 12 W. Dig., 525).

Upon such an appeal the merits will be considered.

Where an order permitted a defendant to serve "an amended answer, setting up such defenses as he shall be advised," &c.:

Held, erroneous; that the defendant must be confined to his proposed amended answer.

Fourth Department, General Term, October, 1881.

Present — SMITH, P. J., HARDIN and DWIGHT, JJ.

ACTION upon a note of \$392.70. Appeal from an order of the Oneida county court, which by its terms permitted the defendant to serve "an amended answer setting up such defenses as he shall be advised within twenty days upon the payment to plaintiff of the sum of fifteen dollars costs."

The motion of defendant in the county court was based upon a proposed amended answer containing the defenses of payment, breach of contract and four counter-claims of \$1,000 each.

Oswald Prentiss Backus, for appellant, argued that the Code of Civil Procedure, section 723, authorized the court to grant the motion only "in furtherance of justice." That the order affected a substantial right and was appealable (*Gowdy agt. Poullain*, 2 Hun, 220; 53 N. Y., 630; 47 How., 354; 59 N. Y., 313; *Sheldon agt. Adams*, 41 Barb., 54).

Second. That the court did not possess the power to grant

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an order permitting a defendant to serve "an amended answer setting up such defenses as he shall be advised," &c.

Third. That the court will not grant an amendment where the amended pleading cannot be sustained (2 *Till & Shearman's Pr.*, 1044).

Fourth. That the first defense contained in the proposed amended answer for breach of contract is insufficient in law, as defendant had received the property and there was no allegation that it was worthless, or that defendant had offered to return it, or that he had suffered any damage (*Hopkins agt. Lane*, 2 *Hun*, 38; *McCormick agt. Surson*, 38 *How.*, 190; *Eldridge agt. Mather*, 2 *N. Y.*, 157).

Fifth. Three counter-claims or causes of action are pleaded in one court. They should have been separately stated and numbered (*Code of Civ. Pro.*, sec. 507; *Bass agt. Comstock*, 38 *N. Y.*, 21).

Sixth. The court will consider the merits of the proposed amended answer (*Morel agt. Garelly*, 16 *Abb.*, 269; *Giles agt. Austin*, 38 *N. Y. Sup. Ct.*, 249; *Smith agt. Bodine*, 74 *N. Y.*, 35; 3 *T. & C.*, 756).

Johnson & Prescott, for respondent, contended :

First. That the court will not review the discretion of the county court (*Gould agt. Rumsey*, 21 *How.*, 97; *McQueen agt. Babcock*, 13 *Abb.*, 268; *Saltus agt. Genin*, 19 *How.*, 233; *St. John agt. West*, 3 *Code R.*, 85; *Ford agt. David*, 1 *Bosw.*, 570; *Travis agt. Borger*, 24 *Barb.*, 614; 12 *id.*, 215; 4 *Duer*, 362; 6 *Bosw.*, 66; *id.*, 154; 6 *Barb.*, 308; 14 *How.*, 33; 35 *Barb.*, 298; 50 *id.*, 95; 38 *N. Y.*, 206).

Second. The proposed amendment being proper, the court was not confined thereto, but had power to grant a general order for that purpose.

THE COURT.—*Held*, *First.* That the order is appealable and the merits will be reviewed.

Second. That the order granted was erroneous and should

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be modified so that the only right which the defendant shall have thereunder, shall be the right to serve the proposed amended answer set out in the appeal book, and as so modified, affirmed, with ten dollars costs and disbursements, to be paid by the respondent.

ALBANY OYER AND TERMINER.

THE PEOPLE agt. MICHAEL CAVANAGH.

Criminal law — Indictment for an assault with intent to do bodily harm with a sharp, dangerous weapon — Laws of 1854, chapter 74 — what conviction may be had — what is a sharp, dangerous weapon, within meaning of statute — question of fact — Intoxication no defense to crime.

Under an indictment for an assault with intent to do bodily harm with a sharp, dangerous weapon (*chap. 74, Laws of 1854*), a conviction can be had of an assault, but not assault and battery.

What is a sharp, dangerous weapon within the meaning of that statute, is a question of fact.

The weapon used must be sharp as well as dangerous, and if not a knife, dirk or dagger, it must be similar to one of them, that is, one which will inflict a similar wound.

Intoxication is no defense to crime.

October Term, 1881.

THE prisoner was indicted for an assault with intent to do bodily harm to one Michael Durand, the weapon used was alleged to be a horseshoe.

The particulars of the assault are stated in the charge.

The prisoner was a man about forty years old; in infancy he was injured in the head by a horse kicking him, a depression an inch long and half an inch deep existed in his forehead over his left eye, as the result of said injury. It was claimed that his mind was weak and when he drank liquor he became wild and delirious, and that this was his condition when he assaulted Durand.

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Edward J. Meegan, for prisoner.

I. The prisoner is indicted under chapter 74 of the Laws of 1854, which provides that "any person who, with intent to do bodily harm and without justifiable or excusable cause, shall hereafter commit any assault upon the person of another with any *knife, dirk, dagger or other sharp, dangerous weapon*," &c., &c. (a.) The construction of this statute limits the general words "or other sharp, dangerous weapon," to a weapon similar to the three particularly specified, and a horseshoe is not such a weapon. "This doctrine is in part the foundation of the celebrated rule that, where particular words are followed by general ones, as if after the enumeration of several classes of persons or things the words are added 'and all others,' these general words are restricted in meaning to objects of the like kind with those specified, therefore under *Stat. 29, Cas. 2, c. 7, § 1*, providing 'that no tradesman, artificer, workman, laborer or other person whatsoever, should exercise his ordinary calling on the Lord's day,' the words 'other person' were held not to include a farmer, who is not a person of the like denomination with those specifically mentioned, for as BAYLEY, J., said, if all persons were meant there was no need of enumeration. And when a statute employed the words 'wherry, lighter or other craft,' the word 'craft' was held not to include a steam tug, because, although a steam tug is a craft yet it is not of the same character as a wherry or a lighter" (*Bishop on Stat. Crimes, sec. 245*; see *Sedg. on Stat. and C. Law* [*Pomeroy's ed.*], 360 n). (b.) The court of appeals in construing the statute which exempted from taxation "every building erected for the use of a college, incorporated academy or other seminary of learning," &c., held that the general words did not include a private boarding school, as general words following particular words apply only to things *ejusdem generis* (*Chegary agt. The Mayor, &c.*, 13 N. Y., 220-9). (c.) The following cases illustrate the rulings upon the statute in question and similar ones: *Foster agt. The People* (50 N. Y., 604), the case of the car hook

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murderer, ANDREWS, J., says, "And the act relates to assaults only and with an instrument different from the one used by the prisoner." *Slatterly* agt. *The People* (58 N. Y., 356), a policeman had been convicted for assaulting a prisoner with his club, CHURCH, Ch. J., said, "It may have been, and probably was, assumed that the facts did not justify a conviction for that offense on account of the character of the instrument. *People* agt. *White* (55 Barb., 606, 608, 611), "clubs, sticks, staves, bricks and stones, and iron bars," were held not within the statute. *People* agt. *Hickey* (11 Hun, 631), "An iron stove griddle or cover, a club and a chair," held not within the statute. "We have no doubt," says LEARNED, J., "that the statutory offense must be an assault with a sharp as well as with a dangerous weapon." *Filkins* agt. *The People* (69 N. Y., 101), the handle of a pitchfork, the tines not being used, not within the statute. *Com. agt. Hawkins* (11 Bush. [Ky.], 603; 1 *Hawley's Am. Crim. Rep.*, 65), blacksmith's tongs held not within the statute.

II. Under the indictment the defendant cannot be convicted of assault and battery. (a.) The statute makes an assault with a certain kind of a weapon a crime. The term battery is not used in the statute. As throwing some light on this question, attention is called, that in the statute describing the offense of an assault with intent to kill, both words "assault" and "battery" are used (3 R. S. [6th ed.], 938, sec. 46). (b.) The words "assault" and "battery" each have a well known meaning at the common law, and in construing a statute the legislature is presumed to have used the words according to such meaning (6 *Bacon Abs.*, 383; 6 *Modern*, 143; 1 *N. Hampshire*, 555, 556; 4 *Gilman*, 205; 8 *Iredell*, 147). (c.) An assault is defined "an attempt, or the unequivocal appearance of an attempt, with force or violence to do a corporal injury" (1 *Arch. Cr. Pl. and Pr.*, 907 n. [Pomeroy's ed.]; 2 *Bish. Cr. Law* [2d ed.], sec. 32). "An assault means something less than actual contact" (*Bigelow's Leud. Cases of Torts*, 230). A battery is defined: "Any

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unlawful touching of the person of another" (1 *Arch., supra*, 911 n.; 1 *Bish., supra*, sec. 62). (d.) If the legislature intended to include a battery in the offense created, it would have so said and made use of that term or an equivalent one. *Young* agt. *People* (2 *Week. Jurist*, 239, 240), sustains our view. The court said: "But it is manifest that the misdemeanor described in the statute is 'an assault with a deadly weapon, instrument or other thing with an intent to inflict upon the person of another bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned or malignant heart' (*chap. 38, sec. 25*), may be complete without a battery, as by shooting at but missing the object of the assault. An indictment for this offense then need not charge a battery. In this case it does not in either of the three counts, but an assault only, with the circumstances required to bring it within the statute, an assault being a different offense from an assault and battery (*R. S.* [1847], *chap. 38, secs. 20, 21*; *Carpenter* agt. *The People*, 4 *Scam.*, 199), and not necessarily including it, an indictment for the former will not support a verdict finding the latter" (1 *Crim. L. Mag.*, 660).

III. An assault and battery having been shown, there can be no conviction for an assault because the battery merges the assault. (a.) *Washburn* (*Crim. Law*, 27) says: "The one (an assault) is an attempt or offer to beat another without touching him, the other (battery) is an unlawful beating of another, and the least touching of another's person willfully or in anger is a battery." Judge COOLEY says: "A successful assault becomes a battery" (*Cooley on Torts*, 162). "So an assault and battery committed at the same time is considered but as one defense, and may be so charged, yet an assault not followed by a battery is an offense, but if so followed the assault is merged in the battery" (*Com. agt. Eaton*, 15 *Pick.*, 275).

D. Cady Herrick, district-attorney, and *John A. Delehanty*, assistant, for the people, argued that what was a sharp, dan-

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gerous weapon was one of fact to be submitted to the jury, citing *Nelson* agt. *The People* (23 N. Y., 293; S. C., 5 Park, 39). They combatted the other questions raised.

After the arguments the prisoner's counsel requested the court:

1. To direct the jury that, it appearing from the evidence that this assault was committed with a horseshoe which is produced, an ordinary horseshoe produced here, they would not be authorized to find the defendant guilty under the indictment of the offense charged in the indictment. Denied.

2. To hold that under the statute with regard to assault with intent to do bodily harm, that the sharp and dangerous weapon mentioned in the statute must be one of a similar character to a knife, dirk or dagger.

THE COURT—I will hold that proposition.

3. To instruct the jury that this horseshoe is not an instrument similar to a knife, dirk, dagger, or other sharp, dangerous weapon.

THE COURT—That I will submit to the jury under such instructions as I think proper.

4. To hold that as there is no count in the indictment for assault and battery upon the evidence, there can be no conviction here for assault and battery.

THE COURT—I hold that under this indictment the jury may convict of the lesser offense, an assault, if they find the higher offense charged is not maintained.

5. To hold that as a battery has been shown, the offense of assault is merged and extinguished in the battery, and therefore there can be no conviction under this indictment.

THE COURT—I decline to hold that as matter of law.

DEFENDANT'S COUNSEL—Does the court hold that under this indictment the prisoner may be convicted of a simple assault?

THE COURT—I hold they may convict of it if the evidence warrants of it, an assault. I do not go so far as assault and battery, but simply an assault.

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OSBORN, J., charged the jury as follows:

Gentlemen of the jury.—In 1881, in June, on the eighteenth day, Mr. Durand, who was living in this city, and by occupation a tailor, as he claims, was in his place of business and attending to his business, and in that business was assisted by this lady who has been put upon the stand, Miss Finn. He says on that occasion the defendant came into the room by a back door without any notice, came in in a violent way, approached the place where he was at work and struck him a blow which partly felled him, and then that in undertaking to defend himself, he seized this board which has been spoken of, when the defendant grabbed this horseshoe which has been produced in evidence and struck him several violent blows upon the head and about different parts of his person.

It would seem, if we are to believe the testimony, and there is no dispute about it, that Mr. Durand was considerably injured upon that occasion at the hands of the defendant. He remained in the hospital for three or four weeks, and his physician is here who testifies that there were a large number of cuts upon his person that he discovered in attending him, so, perhaps, you will have no trouble in arriving at the conclusion that there was considerable degree of violence employed by the defendant on that occasion, and that Mr. Durand was, to a considerable extent, injured in consequence of what took place there.

If this were a simple indictment for assault and battery, you would, perhaps, have little trouble in arriving at a conclusion, but the grand jury have seen fit, in the discharge of their duty, to indict for a graver offense than assault and battery. They have indicted this man for an assault with a sharp, dangerous weapon, intending to do bodily harm, and the first question which arises here is whether this is such an instrument as is fairly embraced within the meaning of this section of the statute. (The court read the statute.) It must be a knife, it must be a dagger, or it must be another sharp

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and dangerous weapon, and that instrument, I am bound to charge you, as I have been requested to do, if not a knife or dagger, must be something of the nature of these instruments. We all know what a knife is, that it is a sharp, dangerous instrument. We all understand what a dagger is, and there are other instruments of a sharp, dangerous character, and an offense committed by those would be an offense by this statute as well as if committed by a knife or dagger; but it must be of the same character, that is, they must be sharp and dangerous, that is, naturally producing the same or similar results as those produced by the instruments mentioned in this statute.

It is difficult to hold, as matter of law, what is or what is not a sharp, dangerous instrument in the meaning of this statute. If it was a knife there would be no difficulty in saying it was fairly embraced in the meaning of the statute. If it was a dagger there would be no difficulty in determining that question, and if it was a sharp instrument, though not a knife or dagger, an instrument like a hatchet or ax, there would be no trouble. But I have concluded to leave it as a question of fact for you, judging from this testimony, from the manner in which the injury was inflicted, and the description of the physician and other witnesses, whether this is or not such a sharp and dangerous instrument as is embraced in the terms of this statute. If so, and you believe the injuries were inflicted, as the complainant claims and this lady swears, without excusable or justifiable cause, and unless the defendant is shielded from responsibility for another reason, to which I will presently call your attention, then the offense as charged in the indictment is made out.

But if you conclude it would be straining the evidence to hold that, although the horseshoe has inflicted injuries similar to those which could be inflicted by a knife or dagger, yet if it is straining a point to say this is an instrument fairly within this statute, I am inclined to charge you that if you shall conclude that this greater offense as charged in the indictment is not proved, that you cannot and will not convict for any

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other or greater offense under this indictment than an assault simply.

The proposition is a doubtful one and I prefer not to have it in the case. If an offense has been committed, and is simply an assault within the meaning of the law, it is an offense for which he can be punished, and the law vindicated and justice maintained.

You are to determine this in the light of this testimony, not with any feeling against this party, but with the simple desire to arrive at the truth.

It is impossible for the court to charge that this is or is not a sharp or dangerous instrument in the meaning of this section, but it is left to you. But it is urged upon the part of the defense that this man should be acquitted entirely; that on that occasion he was not in such a state of mind as to be responsible for his act. They do not claim he is insane, but it is urged that upon that occasion he was in such a state in consequence of injuries he had received earlier in life, and having partaken of liquor; that he did not know what he was about; that he was wild, insane and in no manner responsible for the acts he committed.

It is for you to say whether you are prepared under this evidence to say that a man shall escape from an act so serious in its consequences as this. If you believe the injuries were sustained by complainant, it will be for you to say whether you will establish a precedent that a party may go free under such a plea and the evidence given. If you believe the offense charged in the indictment has been proved, that this was a sharp and dangerous instrument, and this man is not to be shielded from responsibility because of his condition as claimed, then you find him guilty as charged in the indictment.

If you believe this was not a sharp and dangerous instrument, and he was guilty of an assault, then find him guilty of an assault.

Prisoner's counsel asked the court to charge that if the jury have a reasonable doubt as to the character of the instrument,

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as to its being similar to a knife or dagger or dirk, they are bound to hold he is not liable under the statute.

THE COURT — Yes.

Also, that the instrument must be sharp as well as dangerous.

THE COURT — Yes.

Also, and similar to a dirk or dagger or knife.

THE COURT — Yes.

Also, that the element in this crime is the mental one of the intent to do bodily harm.

THE COURT — Yes, but that they are to infer though in the light of the evidence and the act itself.

Also, that if the prisoner was in such a state of intoxication as not to understand the nature of his acts, the jury have the right to consider that fact on the question of intent.

THE COURT — I have charged that if this prisoner, when he committed the act, was in such a state of mind as not to know the character of the act he was doing, and not to know the difference between right and wrong, then he would not be responsible for his act.

Also, that the battery having been proven, any assault is merged into the battery, and there can be no conviction for assault.

THE COURT — I decline.

The district attorney asked the court to charge that the intoxication is no defense.

THE COURT — No, it is not.

THE DISTRICT ATTORNEY — By similar is not meant similar in shape.

THE COURT — No.

THE DISTRICT ATTORNEY — But one which will inflict a similar wound.

THE COURT — Yes. One dangerous in its character, and one that will produce similar injuries to those of a knife or dagger.

Prisoner was convicted of a simple assault with a recommendation to the mercy of the court.

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SUPREME COURT.

ELIZABETH B. V. SMITH, executrix, &c., of EDWARD SMITH, deceased, and another, agt. EDWARD ROBERTS and wife.

Foreclosure of mortgage — Parties — Prior mortgages — Merger.

On June 15, 1865, B., who had previously given a mortgage to S., plaintiff's testator, for \$6,500 gave him another mortgage for \$3,000 upon the same premises, and on the same day conveyed to him an undivided one-fourth part of the premises for \$3,500. The deed recites that the whole premises are covered by the \$6,500 mortgage and that one undivided half part is subject to an agreement to sell to S., dated in 1863. In 1867 B. conveyed to S. one undivided half of the premises, and on the same day the \$6,500 mortgage was canceled. In 1874 B. executed a mortgage to defendant for \$15,000, covering one undivided fourth of the premises. In this action to foreclose the \$3,000 mortgage:

Held, that it is a valid lien for its face upon the undivided one-fourth part of the premises which remained in B., and that the judgment in defendant's action to foreclose his mortgage does not affect the plaintiffs' lien in this action.

Prior mortgages are not necessary parties to an action of foreclosure, but sometimes they are proper parties.

Whether an inferior security is merged in one of a higher character depends upon the intentions of the parties; and when justice and equity require that it should be distinctly kept alive it will not be regarded as merged.

Special Term, August, 1881.

Redfield & Hill, for plaintiff.

Jacob F. Miller, for defendants.

VAN VORST, J. — This is an action to foreclose a mortgage for \$3,000 made by one Joseph A. Benjamin to Edward Smith, dated the 15th day of June, 1865, covering three undivided fourth parts of certain premises owned by him.

The mortgagee Smith has since died, and this action of foreclosure is brought by the plaintiffs as executrix and executor under his will.

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The defendant Roberts, whose mortgage covers an undivided one-fourth part of the premises and who is a second mortgagee, interposes as a first defense that the plaintiffs' mortgage is paid, and, second, that by virtue of a judgment in an action brought by the defendant to foreclose his mortgage, to which action the first mortgagee was made a party defendant, the premises have been sold and were purchased by the defendant, and that the same are now held by him free from any claim or lien in favor of the holders of the first mortgage. That such result follows from the allegations in the complaint in the defendant's action of foreclosure, and the judgment in pursuance thereof. A short statement of facts is necessary to determine the value and sufficiency of these defenses. The mortgagor Benjamin owned a tract of land in the upper part of the city of New York. In 1863 he mortgaged the entire premises to the above named Edward Smith to secure the sum of \$6,500.

On the 15th day of June, 1865, he executed the mortgage to Smith, herein sought to be foreclosed, to secure the payment of his bond for the sum of \$3,000, payable on the 1st day of November, 1866, with interest payable semi-annually. On the same day Benjamin and wife conveyed to Smith, by a deed with full covenants, one undivided fourth part of the premises. The consideration for this conveyance expressed therein is \$3,500, which is stated to have been paid.

In this deed it is recited that the whole of said premises are covered by the mortgage of \$6,500 to Smith, and that an undivided half thereof was subject to an agreement to sell the same to Smith, dated November 7, 1863. The mortgage for \$3,000 and the conveyance of an undivided one-fourth part of the premises to Smith were both recorded on the 15th June, 1865, at three o'clock P. M. In 1867 Benjamin and wife conveyed to Smith, by warranty deed with full covenants, an undivided half of the premises, and upon the same day the \$6,500 mortgage was canceled of record.

Thus in February, 1867, Edward Smith owned three undi-

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vided fourth parts of the premises and also held a mortgage for \$3,000, which by its terms covered three undivided fourths. In May, 1874, Benjamin and wife executed a mortgage to the defendant Roberts for \$15,000. This mortgage covered one undivided fourth of the premises, which was the part thereof which still remained in Benjamin. This is a sufficient statement of the conveyances and the condition of the record to present the questions raised by the first defense.

The counsel for the defendants urges that the \$3,000 mortgage to Smith was merged and extinguished through the conveyances to Smith above mentioned. The \$3,000 mortgage covered an undivided three-fourths of the premises. But, as has been seen, on the same day on which the mortgage was executed, Benjamin executed and delivered to Smith a conveyance in fee of one-fourth of the whole premises.

It does not appear which was first executed and delivered, the deed or the mortgage. One of them, however, must have been prepared and executed in fact before the other; and the clear inference is that the mortgage was made in point of time after the deed. If that be so the \$3,000 mortgage would not in equity attach to the one-fourth that day sold and conveyed to Smith. And there is a strong inference in that direction, and to the priority of the deed over the mortgage, from the silence of the deed with respect to such mortgage as either made or about to be, whilst it speaks of and enumerates specifically the incumbrances subject to which the conveyance was made, which are stated to be the \$6,500 mortgage covering the whole premises and the contract covering an undivided half part thereof.

From this it would follow that it was clearly the intention of the parties that the \$3,000 mortgage should, in its lien, be limited to the remaining undivided three-fourths of the premises, of which Smith was still seized, subject to the specific incumbrance and lien mentioned. But afterwards, as has been seen, Benjamin conveyed to Smith an undivided half of the whole premises. This conveyance satisfied the lien of the

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contract to sell and the \$6,500 mortgage, was canceled, leaving outstanding the \$3,000 mortgage.

There is nothing in the evidence to show that this latter mortgage, in whole or in part, furnished any part of the consideration for that conveyance. But by the receipt of that conveyance the mortgage, in so far as that undivided half was concerned, was merged in the deeds, and the remaining right in the mortgagee would be limited to the undivided one-fourth part still remaining in Benjamin, and that is the precise part which is claimed to be subject to the \$3,000 mortgage in this action. The possession of this bond and mortgage by the plaintiffs is some evidence that the same has not been in fact paid, and that it was regarded by both parties as a valid and subsisting security, at all times after the above conveyances, is shown by the fact that Benjamin during several years thereafter recognized it as an existing obligation by paying, or promising to pay, the interest accruing thereon, and by inventorying it in the year 1876, in a schedule annexed to his petition in bankruptcy, as a debt at that time owing by him.

Whether an inferior security is merged in one of a higher character depends upon the intentions of the parties, and when equity and justice requires that it should be distinctly kept alive it will not be regarded as merged (*Franklyn agt. Hayward*, 61 *How. Pr.*, 43). Smith's mortgage is, then, a valid lien for its face with interest upon the undivided one-fourth part of the premises which remained in Benjamin. And this fact can be no surprise to the subsequent mortgagee as Roberts took his mortgage on this one-quarter with the records before him, which showed that Smith's prior mortgage was still outstanding, and in law and equity he took subject to the prior legal and equitable rights of the first mortgagee. Roberts had no rights to be affected the one way or the other by the conveyance of the one undivided half of the premises to Smith in 1867, as his mortgage was not then in existence, and when he took his mortgage in 1874 the

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records contained a notice to him that the conveyance of 1867 was made in pursuance of an agreement made in 1863, and that the consideration for the same was the \$6,500 mortgage, then a lien upon it, and which was in fact canceled when the conveyance was delivered. And although as to that one undivided half the \$3,000 mortgage ceased to be a lien for the reason that the title thereto had become vested in the mortgagee, there was nothing to show that any part of that mortgage was taken into consideration in the consummation of that transaction. It must, therefore, follow that the plaintiffs' lien for the whole of their mortgage upon the one undivided one-fourth part of the premises is unaffected by the transaction above stated, and that Roberts' lien is not to be preferred in equity to that of the plaintiffs.

This disposes of the first defense adversely to the defendants, and the second defense must share the same fate. The mortgagee Smith was not a necessary party to the action for the foreclosure of Roberts' mortgage. Smith's lien was prior.

In the *Emigrant Industrial Savings Bank agt. Goldman*, CHURCH, Ch. J., says: "The rule is settled that the only proper parties to a bill of foreclosure, so far as mere legal rights are concerned, are the mortgagor and mortgagee and those who have acquired rights under them subsequent to the mortgage, and those parties only are affected by the judgment" (75 N. Y., 127-131).

Prior mortgagees are sometimes made parties for the purpose of having the amount of their incumbrances liquidated, and when it is proposed to satisfy all liens upon the mortgaged premises (*Holcomb agt. Holcomb*, 2 Barb., 20). But the foreclosure suit of Roberts had no such intention. If it had any purpose at all with respect to Smith's mortgage it was a hostile one. But I can discover no distinct reference to Smith's mortgage in that suit. The most that is claimed by the learned counsel for the defendant in that regard is expressed in the words usually found in complaints for the foreclosure of mortgages, that the defendant Smith "had,

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or claimed to have, an interest in or lien upon the mortgaged premises, or some part thereof, but which interest or lien, if any, had accrued subsequently to the lien of the said (Roberts) mortgage and was subordinate thereto." If Smith had a lien subject to the plaintiffs' mortgage it was cut off by the judgment of foreclosure and sale. But under such general language he was not bound to appear in the action and maintain the integrity of his prior mortgage, which was not in words attacked, and the amount of which, even if established, it was not proposed to have paid out of the proceeds of the sale. The lien of his mortgage and its priority over Roberts' mortgage is not, therefore, affected by the judgment in that case.

Upon the whole case judgment is ordered for the foreclosure of the plaintiffs' mortgage, and the necessary decree must be prepared and submitted for signature. A copy of the proposed decree must be served on the other side, with ten days' notice of settlement.

SUPREME COURT.

THOMAS LEE agt. THE BOARD OF SUPERVISORS OF JEFFERSON COUNTY.

Bonds issued by towns for railroad purposes — The subject of town charges — Decisions of United States courts affecting state courts — Validity of bonds issued by the town of Orleans — Taxpayer not authorized to stay action of the ordinary machinery provided for the collection of judgments which are declared by statutes to be town charges.

Some years ago the town of Orleans, Jefferson county, issued bonds to the amount of \$80,000 in aid of the Clayton and Theresa railroad; \$70,000 of these bonds were sold to Nathan E. Platt, of Chicago. Since 1874 the town has contested payment of the bonds in the United States courts, the case at one time being carried into the United States supreme court. The bonds were held good, and in accordance with this decision the board of supervisors of Jefferson county two years.

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ago levied on the town \$10,000, and last year \$18,000. Five judgments, amounting to between \$17,000 and \$18,000, were to be provided for by the board this year, when the plaintiff Lee, a taxpayer in the town of Orleans, brought suit against the board, and a temporary injunction was granted restraining the board from levying the tax or from adjourning until the case was decided. Nathan E. Platt, upon affidavits and upon a copy of the record of the United States supreme court judgments, wherein Nathan E. Platt was plaintiff and the town of Orleans, Jefferson county, defendant *ex parte*, applied to have the injunction order dissolved, which application resulted in the order to show cause, which, in effect, asks that Platt be made a party defendant herein instanter, and that the plaintiff herein be required to amend the summons and complaint by inserting the name of said Platt as an additional party defendant, and to make such amendments to the pleadings as shall be necessary to effect such purpose, and why the injunction should not be dissolved, or that Platt have such order or relief in the premises as may be proper :

Held, first. That as the defendant, the board of supervisors, is a nominal party, having no pecuniary interest in the question for the determination of which this action was brought, and a determination of the questions raised by the plaintiff in his favor would be prejudicial to the rights and interests of Nathan E. Platt, it would, in effect, stay and defeat the collection of the several judgments recovered by him against the town of Orleans in the United States courts, and he is therefore a necessary and proper party, and should be brought as such before the court before the trial and determination of the question raised by the complaint and papers presented.

Held, second. That all the questions in the case having been decided by the United States circuit court and the United States supreme court, when the entire town of Orleans was a party to the suit, Lee, a single taxpayer, cannot maintain an action.

Held, third. That the judgments of the United States court conclusively establish an indebtedness on the part of the town of Orleans to Platt, the holder of the bonds and coupons, and as against the town he is entitled to issue an execution and satisfy the judgments out of any property belonging to the defendant in those actions, and as against the town he is entitled to avail himself of the statutory provisions enacted for the purpose of facilitating the collection of judgments rendered against the town.

Held, fourth. The Revised Statutes (*vol. 1, page 558, sec. 8*) declares in terms, "judgments recovered against a town shall be a town charge." The judgments recovered by Platt, by virtue of that provision of the statute, are declared to be a town charge, and being a town charge, they fall within the provisions constituting the machinery for the col-

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lection of town charges, to wit: Assessment and levy upon the taxable property within the territory of the township.

Held, fifth. That the statute of 1881, known as an act for the protection of taxpayers (*Laws of 1881, chap. 531*), does not apply to the case in hand. It was passed to prevent fraudulent recoveries of judgments by default or by collusion, not for the purpose of giving every taxpayer within the limits of the town the right to litigate afresh questions fairly, fully and honestly presented by way of defense and solemnly adjudicated adversely to the town.

Held, sixth. That notwithstanding the act of 1881, the judgments recovered by Platt, the creditor, against the town of Orleans are conclusive upon the town of Orleans, and it is the duty of the board of supervisors of Jefferson county to apply the provisions of the law relating to the collection of judgments, and to place upon the schedule of the town a sum sufficient to pay and liquidate the judgments so recovered by Platt, the creditor.

Special Term, November, 1881.

PROOF of service upon the defendant of the order to show cause was duly made. An injunction order, upon the application of the plaintiff *ex parte*, was granted November 21, 1881, enjoining "the board of supervisors from taking any proceedings or doing any act or thing whatever for the collection of the amount due upon the bonds or coupons annexed, particularly mentioned in the complaint, or either of the judgments mentioned and described in the complaint in this action, or any part thereof, of the taxpayers of the said town of Orleans, in pursuance of the Revised Statutes or the provision of chapter 554 of the Laws of 1880."

Upon the 28th of November, 1881, Nathan E. Platt, upon the affidavit of Francis Kernan and Nicholas E. Kernan, and upon a copy of the record of the United States supreme court judgments, wherein Nathan E. Platt was plaintiff and the town of Orleans, Jefferson county, defendant *ex parte*, applied to have the injunction order dissolved, which application resulted in the order to show cause now here returnable.

The order to show cause in effect asks that Nathan E. Platt be made a party defendant herein instanter, and that the

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plaintiff herein be required to amend the summons and complaint herein by inserting the name of said Platt as an additional party defendant herein, and such amendments to the pleadings made as shall be necessary to effect such purpose.

Second. Why the injunction order made herein November twenty-first should not be dissolved, or that Platt have such order or relief in the premises as may be proper. The order to show cause, with the papers accompanying it, was duly served upon the plaintiff and upon the defendants.

No appearance was made by the board of supervisors on the return of the order to show cause.

L. J. Dorrian appeared for plaintiff.

Francis Kernan and *Nicholas E. Kernan*, for Nathan E. Platt.

HARDIN, J.—Upon the hearing had upon the order to show cause it was assented to by the respective counsel that if the conclusion was reached, at the close of the argument, that Nathan E. Platt was a proper party defendant, and that his application to require the plaintiff to make him such party ought to be granted, that such conclusion and determination might be certified to the adjourned special term to be held at the court-house in the city of Utica, on Monday, the fifth day of December next, at ten o'clock, and that thereupon the special term might and should allow the proper order for such purpose, with the same force and effect as though the application for that purpose had been originally submitted to that court.

From an inspection of the allegations contained in the complaint in this case and the proofs now submitted, it is apparent that the defendant, the board of supervisors, is a nominal party, having no pecuniary interest in the question for the determination of which this action was brought. A determination of the questions raised by the plaintiff in his favor

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would be prejudicial to the rights and interests of Nathan E. Platt. It would in effect stay and defeat the collection of the several judgments recovered by him against the town of Orleans in the United States court. He is therefore a necessary and proper party, and should be brought as such before the court before the trial and determination of the question raised by the complaint and papers here presented. Therefore the plaintiff's proceedings should be stayed until a proper order is entered, amending the summons and complaint by making Nathan E. Platt a party defendant, which stay of the plaintiff's proceedings, however, may be vacated upon service of a copy of the order of the special term, so to be made, and a copy of the amended summons and complaint upon Francis Kernan, the counsel of said Platt, and which service shall be deemed a sufficient service of said amended summons and complaint upon said Platt. Either party, upon a certified copy of the foregoing conclusion, and upon the original papers used upon this motion, may apply at said special term for the order aforesaid.

Proceedings were instituted to bond the town of Orleans, under the provisions of the acts chapter 907, Laws of 1869, and chapter 925, Laws of 1871, before the county judge of Jefferson county. Those proceedings resulted in an adjudication in favor of the proceedings, and in the appointment of three commissioners to issue \$80,000 in bonds and deliver the same in exchange for stock of the Clayton and Theresa Railroad Company. Those proceedings were brought in review before the general term of this department and affirmed. Subsequently the proceedings had before the county judge were reviewed by the court of appeals, in 1873, and that court reversed the judgment of the supreme court and of the county judge (*People agt. Sawyer*, 52 *N. Y.*, 296), on the ground that petitioners, in the bonding proceedings, had the right to withdraw their names from the petition "at any time prior to the final submission in the case to the county judge," and that after allowing the persons to withdraw their consents there

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did not remain sufficient consents, representing a majority of the taxable property of the town as the same appeared upon the last assessment roll.

The commissioners for the town issued bonds in behalf of the town, purporting to bind the town in the sum of \$80,000.

Nathan E. Platt, a resident of the city of Chicago, in the state of Illinois, became the owner of \$70,000 of the bonds so issued. Subsequently he commenced an action to recover upon certain coupons attached to said bonds, in the circuit court of the United States. A verdict was directed therein in his favor. Subsequently a writ of error was allowed, and upon that writ of error a judgment was pronounced by the supreme court of the United States in favor of Platt, at the October term, in 1878 (*See Orleans agt. Platt*, 99 U. S. Rep., 676). In that decision it was held that the bonds were like other commercial securities, the court following *County of Warren agt. Marcy* (97 U. S. Rep., 96). The same doctrine is found in 100 United States Reports, 585. Secondly. That Platt was a *bona fide* holder of the bonds so issued, and that the town was guilty of gross laches and negligence in not having obtained a "preliminary injunction," "forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them until the case made by the *certiorari* was finally brought to a close." Third. That the bonds in the hands of Platt, the *bona fide* holder, were free from objection and could be enforced, and that the judgment of the circuit court, establishing the bonds and the recovery upon the coupons, was valid and should be sustained (*See opinion of SWAIM, J.*, 99 U. S. Rep., 647). Such judgment of the circuit court of the United States is conclusive upon the town of Orleans. It is conclusive upon all questions actually litigated, or which might have been litigated, upon the parties to the action and their privies, according to well settled principles and numerous adjudications (*Bellinger agt. Craig*, 31 Barb., 534; *approved in Gates agt. Preston*, 41 N. Y., 113; 7 Weekly Dig., 315;

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42 *Barb.*, 41; see also 54 *N. Y.*, 644; 75 *N. Y.*, 153; 77 *N. Y.*, 76; 3 *Barbour's Ch.*, 343; 4 *Coms.*, 71). Such force and effect of the judgments of the supreme court were recognized by the legislature of this state, in chapter 509 of the Laws of 1880, entitled "An act to authorize certain officers of the town of Orleans to issue bonds to pay indebtedness of said town." The title of the act clearly recognizes the Platt bonds as a part of the "indebtedness of such town." In the first section of that act it is recited that "the United States courts having adjudged that, by reason of their having been transferred to a *bona fide* holder, said bonds are a valid and legal indebtedness against town and the property therein." And also "which have been so adjudged a legal indebtedness against said town." As to the effect to be given to such words in the act from which quotations have just been made, see opinion of HUNT, J., in *Little Rock agt. National Bank* (98 *U. S.*, 308). Assuming that the indebtedness created against the town by the issuance of the bonds of the town, and the selling thereof to Platt, arose when he became a *bona fide* purchaser thereof, as has been determined by the supreme court of the United States, it is not apparent that such indebtedness falls within the condemnation contained in sections 10 and 11 of article 8 of the constitution of the state of New York. Those sections were added to the constitution of the state by a vote of the people in November, 1874, and by section 1 article 16 of the constitution it did not take effect until the first day of January, 1875.

The commissioners appointed by the county judge subscribed for stock on the third day of April, 1872, and the next day issued and delivered in payment 160 bonds.

In the case of *Knapp agt. The Town of Newton* (1 *Hun*, 268), the court held, viz.: "The legislature has power to require the town to pay bonds issued for a local improvement, though the statute under which they were issued is unconstitutional." The case in hand differs from *Weisner agt. The Village of Douglass* (64 *N. Y.*, —), as no indebtedness had been

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created before, or adjudicated to be valid against the corporation before the passage of chapter 577 of the Laws of 1868. Besides, the subscription for stock in a manufacturing corporation in that case was held to be for a private and not a public purpose. This case also differs from *Thomas agt. City of Richmond* (12 Wall., 349), where the contract sought to be enforced was illegal.

The views already expressed lead to the conclusion that the judgments of the United States court conclusively establish an indebtedness on the part of the town of Orleans to Platt, the holder of the bonds and coupons aforesaid, and that as against the town he is entitled to issue an execution and satisfy the judgments out of any property belonging to the defendant in those actions, and that as against the town he is entitled to avail himself of the statutory provisions enacted for the purpose of facilitating the collection of judgments rendered against the town.

It may not be importune to briefly consider the legislation of this state bearing upon the subject of the collection of judgments recovered against towns. Revised Statutes (*vol. 1, page 558, sec. 8*) declared, viz.: Judgments recovered against a town, or against town officers, in actions prosecuted by or against them, in the name of office, *shall be a town charge*, and when levied and collected shall be paid to the person to whom the same shall have been adjudged. An analogous provision in respect to judgments recovered against counties is found in section 6, title 3, part 1, chapter 12 of the Revised Statutes (*vol. 1, page 384*).

It may be observed in passing that section 8 (*quoted supra*) declares in terms "judgments recovered against a town shall be a town charge." Applying that declaration to the case in hand, the judgments recovered by Platt, by virtue of that provision of the statute, are declared to be a town charge. Being a town charge, do they not fall within the provisions constituting the machinery for the collection of town charges, to wit: Assessment and levy upon the taxable property within the territory of the township.

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By chapter 554 of the Laws of 1880, the legislature made further provision "to facilitate the collection of judgments against counties, towns, cities and villages." Section 1 of that chapter provides, viz.: "If a final judgment for a sum of money, or directing the payment of money, shall have been or shall hereafter be recovered against any county, town, city or incorporated village within this state, and the same remains, or shall hereafter remain, unpaid, and the execution thereof is not or shall not be stayed, as required by law * * * the said board of supervisors * * * is hereby empowered to assess, levy and cause to be collected, at the same time and in like manner as other moneys for the necessary expenses of the county, town, city or village, as the case may be, are then next thereafter to be assessed, levied and collected, and in addition to the moneys now authorized by law to be assessed, levied or collected for that purpose, a sum of money sufficient to pay the said judgments, with the interest thereupon, and fees and expenses chargeable by law upon execution if any issued to collect the same." Section 2 of that act provides that "no restriction or limitation imposed by law as to the sum to be raised in any year in any city or village shall apply to the moneys to be raised for the purpose specified in the last preceding section; but the said moneys shall be raised in addition to any sum so restricted or limited. The language of the first section of the act is mandatory. It is very like the language found in the act brought under consideration in the case of *The People agt. The Board of Supervisors of Herkimer County* (56 Barb., 452), which case was subsequently affirmed by the general term of the fifth district, and the case, and the doctrine thereof approved in *People agt. Board of Supervisors of Otsego County* (51 N. Y., 401). These provisions of law seem to be ample to enable a judgment-creditor to collect the amounts due and unpaid on the several judgments obtained by him. It will be observed that in the statutes just quoted no discrimination is made against judgments of the United States

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courts. It must be assumed, therefore, that they fall within the general provisions of the statute referred to. These provisions of law seem to answer the requirements of the rule laid down by the United States supreme court in *Merriweather agt. Garrett* (102 *U. S. Rep.*, 472). It was there held: First. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. Second. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. Chief justice WARRE says in that case, that "tax can only be collected under authority from the legislature; that if no authority exists, the remedy is by appeal to the legislature, which alone can grant the relief."

But, as before observed, apparently the power of the legislature has been exercised and has authorized the collection and payment of all town charges, and, inasmuch as the judgments have ripened into town charges, it would seem that the ordinary machinery for their enforcement was ample under the provisions of law already adverted to. But here in the argument of the learned counsel for the plaintiff, in behalf of a taxpayer of the town of Orleans, it is insisted, first, that a town is not a corporation; secondly, that although the town may be concluded by the judgments obtained against it, that the judgments are conclusive upon the taxpayer, and that he may litigate the validity of the judgments and incidentally his liability to contribute his proportionate share as a taxpayer of the town towards the payment thereof.

The views already expressed render it unnecessary to consider *in extenso* the argument that a town is not a corporation. It may be observed in respect thereto, however:

First. That chapter 907 of the Laws of 1869 declares, in section 1, viz.: The words "municipal corporation, when used in this act, are to be construed to mean any city, town or incorporated village in this state."

Second. In chapter 11, title 1, part 1, article 1 of the

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Revised Statutes (*vol. 1, page 337*) it is enacted, viz. : Section 1. "Each town, as a *body corporate*, has capacity." Subdivision. "To sue and be sued in the manner prescribed by the laws of the state." * * * Section 2. "No town shall possess or exercise any corporate powers except such as are enumerated in this chapter, or shall be specially given by law or shall be necessary to the exercise of the powers so enumerated or given." Section 3. "All acts or proceedings by or against a town in its *corporate capacity*, shall be in the name of such town."

Third. The right of a taxpayer to interfere with the ordinary machinery for levying and collecting taxes, in the absence of fraud and in the absence of legislation specially authorizing it, has been doubted in numerous cases and denied (*Cummins agt. Supervisors of Jefferson County, 63 Barb., 294, affirmed in the court of appeals, February 1, 1876*).

But the learned counsel for the plaintiff plants the right to maintain this action upon chapter 531 of the Laws of 1881, known as an act for the protection of taxpayers, and that chapter must be considered in determining the right of the plaintiff to enjoin the board of supervisors. Does the act authorize the taxpayers of the town of Orleans to stay the action of the ordinary machinery provided for the collection of judgment which, as has been seen, are declared by statute to be town charges? That act of 1881 introduces several new provisions, and confers some new remedies for the protection of taxpayers. It provides that "all officers, agents, commissioners and other persons acting for and in behalf of any county, town, village or municipal corporation of this state may be prosecuted, and an action or actions may be maintained against them to prevent any illegal official act on the part of such officers, agents or other persons, or to prevent waste or injury to any property, funds or estate of such county, town, village or municipal corporation, by any person whose assessments, &c., * * * shall amount to \$1,000, and who shall be liable to pay taxes on such assessments in the town, county,

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village or municipal corporation to prevent waste or injury to whose property the action is brought, or who has been assessed or paid taxes therein upon an assessment or assessments of the above-named amount within one year previous to the commencement of any such action or actions.

If provisions of the law, to which reference has been made, are applicable to judgments recovered against a town, it cannot be said that the board of supervisors by complying with the provisions of the law in respect to levying taxes upon the town of Orleans to pay the judgments referred to are engaged in "any illegal official act." Certainly whatever is authorized by the statutes in respect to the collection of the judgments, to be done by the board of supervisors, can in no sense be denominated an "illegal official act" on the part of the board of supervisors of Jefferson county; and if the provisions of law authorize taxation to pay the judgment which are town charges, then it cannot be said that "waste or injury" of the property of the taxpayer is to take place by the application of the governmental machinery for taxation.

Waste, as ordinarily understood, implies wrongful taking of property without right, without sanction of law, in violation of right or of liens thereon. But these words "waste and injury" seem to find a definition in the further provisions of the act. It is declared, viz.: "In case the waste or injury complained of consists in any board, officer or agent of any county, town, village, municipal corporation, by collusion or otherwise contracting, auditing, allowing or paying or conniving at the contract, audit, allowance or payment of any fraudulent, illegal, unjust or inequitable claims, demands or expenses, or any item or part thereof, against or by such county, town, village or municipal corporation by permitting a judgment or judgments to be recovered against such county, town, village or municipal corporation, or against himself in his official capacity, either by default or without the interposition and proper presentation of any existing legal or equitable defenses, the court may, in its discretion, prohibit the payment or col-

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lection of any such claims, demands, expenses or judgments, in whole or in part, or may enforce the restitution thereof if heretofore or hereafter paid or collected by the person or party heretofore or hereafter receiving the same."

Certainly the board of supervisors are not about to engage in any collusion, or in the contracting of a debt, or in the auditing of a debt, or in the allowing or paying or conniving at the contracting, or audit, or allowance or payment of any fraudulent, illegal, unjust or inequitable claims, demands or expenses as against the town of Orleans.

A recovery of judgments in a court of competent jurisdiction after a full and protracted litigation establishes a legal indebtedness, and it is therefore difficult to see how the provisions of the law just quoted can have any application to such a case, such a debt, such a demand. Certainly there has been no collusion between the creditors and the board of supervisors, or between the board of supervisors and any other person, or between the town and the creditor, or between the town and any other person. Nor has there been any recovery by default or without the interposition and proper presentation of any existing legal or equitable defense. The town has had its day in court. It has presented its defense, and by the highest tribunal that defense has been condemned. Certainly there is no power in this court to interfere with the force of the judgment of the United States court.

The statute from which we have quoted seems to contemplate that relief may be afforded, at the instance of taxpayers, by setting aside or opening a judgment, where there has been collusion in suffering a judgment by default, without the presentation of all legal or equitable defenses, and to provide that when such judgment is brought to the attention of the court, at the instance of a taxpayer, "the court may, in its discretion, vacate, set aside and open said judgment." The further provisions of the statute seem to provide, however, in such a case, as where leave is given to defend, the

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defense is to be for the defendant in the action wherein the alleged collusive, fraudulent or illegal judgment has been obtained by reason of the omission to "interpose and enforce any existing legal or equitable defense therein." And the statute seems to contemplate that the defense may be interposed in the name and behalf of the defendant "under the direction of such person as the court may in its judgment or order designate and appoint."

Manifestly whenever such a defense is allowed to be interposed it must be in the name and in behalf of the defendant in the action. Of what use would be leave to interpose a legal and equitable defense in the actions that have already ripened into judgments even if the court possessed power to interfere with the judgments of the United States courts? No legal or equitable defense is here suggested in behalf of this taxpayer which has not already apparently been presented, fully considered and deliberately repudiated by the judgments of courts of competent jurisdiction. The determination upon matters now sought to be interposed in behalf of the taxpayer in the name of the defendant, the town of Orleans, we must presume would be the same as now remains in the judgment which has been pronounced.

But a more complete answer to the position taken by the learned counsel for the plaintiff under the statute of 1881 is that the statute does not apply to the case in hand. It was passed to prevent fraudulent recoveries of judgments by default or by collusion, not for the purpose of giving every taxpayer within the limits of the town the right to litigate afresh questions fairly, fully, honestly presented by way of defense, and solemnly adjudicated adversely to the town.

Notwithstanding the act of 1881 the judgments recovered by Platt, the creditor, against the town of Orleans must be held conclusive (there being no fraud or collusion in respect thereof alleged) upon the town of Orleans, and that it is the duty of the board of supervisors of Jefferson county to apply

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the provisions of the law hereinbefore referred to relating to the collection of judgments, and to place upon the schedule of the town a sum sufficient to pay and liquidate the judgments so recovered by Platt, the creditor.

These views lead to a dissolution of the injunction so far as it restrains the board of supervisors from taking the proper steps to levy and collect the necessary taxes upon the town of Orleans for the payment of the judgments so held by Platt.

The injunction will, therefore, be modified in accordance with the views herein expressed.

Inasmuch as the question arising here under the provisions of chapter 531 of the Laws of 1881 are new, costs are not awarded to either party.

After proof of the service of a copy of this opinion either party may have an order settled before me upon one day's notice.

N. Y. COMMON PLEAS.

In the Matter of the Assignment of JOHN A. SWEZEY and
JOSEPH DART, &c.

Assignments — Trade-mark — Examination of party under general assignment act of 1877 — Trade-mark cases distinguished — Trade-marks, when assignable — When leviable — Statute of exemption from attachment.

Where the property of a copartnership is assigned under the general assignment act, by one member of the firm, and he also assigns in the same instrument his individual property not exempt under attachment:

Held, "The statute of exemption does not expressly exempt a trade-mark," and therefore the clause in the assignment is not available to prevent the examination of such assignor under section 21 of the general assignment act of 1877.

Where "the assignment does not except property which is not subject to levy, but property which the exemption act declares to be exempt:"

Held, the examination should be allowed as if no exception were contained in the assignment.

Where, after such general assignment an application is made by creditors

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of the assignor "to ascertain whether or not certain property called a trade-mark belongs to the assigned estate:"

Held, "That can only be determined by learning the facts which give the trade-mark its value."

Held, also, that in such case it is proper that the order allowing such examination should "explicitly state what shall be the subject and the extent of the examination."

The present application distinguished from the *Burnett case* (8 Daly, 363) in this, that "there the avowed object of the examination was not to aid the assignee in the administration of his trust, save in the way of obtaining testimony to be used in such actions as he might afterwards bring;" while "here it is not shown that the testimony is sought for use in any action hereafter to be brought."

The sub-rule of rule 73 (*Moak's Underhill's Principles of Torts*, p. 632) and the rule laid down in *Kidd agt. Johnson* (9 Reporter, 729) cited and approved.

Special Term, December, 1881.

I. MOTION by assignor Dart to set aside an order previously obtained for his own examination on the grounds that the court had no jurisdiction to grant the order; that it was made and is returnable before judge JOSEPH F. DALY, and could not be heard before any other judge; that the examination concerned a trade-mark not embraced but excepted by the assignment; that the proposed examination was not limited and not in aid of the assignee.

Motion denied.

II. Motion for a stay of proceedings, with a view of appealing from the denial of motion to set aside order for examination of assignee Dart.

The general assignment of Swezey & Dart, copartners, preferred Buckingham & Paulson, copartners, among their creditors. The assignment was executed by Joseph Dart alone; and besides assigning the property of his firm, also assigned such individual property as might not be exempt from attachment belonging to himself. A certain trade-mark, "Peerless," used on carpet warps is claimed by the moving creditors as belonging among the assets of Swezey & Dart. The peti-

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tion sets forth that this trade-mark had heretofore been adjudicated by the supreme court at special trial term, in a suit by one Holbrook and others against Swezey & Dart, to be the property of the defendants in that suit, namely, Swezey & Dart. The assignor Dart, by an order of judge JOSEPH F. DALY, dated November 15, 1881, was directed to appear at the chambers of this court and be examined respecting this trade-mark in the interest of all the creditors, in order to determine what if any interest Swezey & Dart had in it, and what if any interest their assignee under their general assignment has in it. It also appearing in the petition of Buckingham & Paulson that Dart had taken possession of the trade-mark and formed a corporation for its use with himself, E. K. Jones and one Reynolds, as directors. This order for Dart's examination he moves to set aside and vacate. On the denial of that motion he further moves for a stay under that denial in view of an appeal from such denial. It appeared by adjournments, and also affidavit, that witness Dart had appeared on the return of the order for his examination, was sworn, and requested and obtained an adjournment of the examination; and that his attorney had subsequently applied to judge BEACH for leave to move to set aside the said order, which application had been denied by the latter judge.

E. K. Jones, attorney for Dart, assignor, with whom was Robert S. Green of counsel, in support of the application to vacate and set aside the order for Dart's examination, urged the following:

I. The examination is returnable before a judge specified, and no other judge is competent to conduct the examination. The proper judge is judge JOSEPH F. DALY.

II. The court has no jurisdiction to grant such an order on application of a creditor. The assignee must make the application or it must be made in his behalf or with his approval. The case of *Burntett* (8 *Daly*, 363,) is precisely in point.

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III. The proposed examination is without any limit (*Id.*).

IV. The trade-mark is excepted from the assignment, and is the property of Dart, and the creditors have no interest in it.

Chauncey B. Ripley, of counsel for creditors Buckingham and Paulson.

I. The witness Dart waived any right he had to move to vacate the order for his examination by appearing, being sworn and procuring an adjournment.

II. The objection that the judge who made the order is the only proper judge before whom the application can come has been passed upon by the court adversely, and is untenable.

III. Dart assigned his individual property as well as the firm property.

IV. The proposed examination is in aid of the creditors, and comes within the provisions of the general assignment act (*q. v. sec. 21*).

V. The motion on behalf of witness should be denied and the examination should proceed.

VAN HOESSEN, *J.*—The *Burnett case* was not like this. There the avowed object of the examination was not to aid the assignee in the administration of his trust save in the way of obtaining testimony to be used in such actions as he might afterwards bring. Chief justice DALY said that such testimony ought to be taken after those actions had been begun, and that the Code of Civil Procedure made ample provision for the examination of parties in pending actions. Here it is not shown that the testimony is sought for use in any action hereafter to be brought. The examination is, as I understand it, to ascertain whether or not certain property, called a trade-mark, belongs to the assigned estate. That can only be determined by learning the facts which give the trade-mark its value. If, as chief justice DALY said in the *Hegeman case*, this trade-mark is made valuable simply because the public believe that Dart's personal skill, experience and peculiar

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knowledge impart to the fabric a perfection which it would not possess if made by any other person, it does not belong to the assigned estate. If, on the other hand, the trade-mark indicates a certain fineness or quality in the goods, and does not owe its value to the public belief in the peculiar skill of the manufacturer individually, it will be part of the assigned estate, and will go to those who buy the factory which has heretofore produced the fabric.

The sub-rule of rule 73 (*Moak's Underhill's Principles of Torts*, p. 632,) thus states the law: "Although a trader may have a property in a trade-mark sufficient to give him a right to exclude all others from using it, if his goods derive their increased value from the personal skill of the adopter of the trade-mark, he will not be allowed to assign it, for that would be a fraud upon the public. But if the increased value of the goods is not dependent upon such personal merits, the trade-mark is assignable."

In *Kidd agt. Johnson* (9 *Reporter*, 729) the United States supreme court held, as has chief justice DALY in several cases, that trade-marks affixed to certain articles manufactured at a particular factory, will pass with the factory when it is transferred by contract or by operation of law.

A trade-mark may be, and often is, transferred *in invitum* by proceedings in bankruptcy.

Now the question here is whether or not the trade-mark in question owes its value to the personal skill of Mr. Dart as a manufacturer. If it does it does not pass by assignment, for the public must not be deceived into buying goods which, though bearing his trade-mark, are not the product of his peculiar skill. If, however, it is the machinery, the factory, which has produced superior goods, the trade-mark goes with the machinery. In other words, the trade-mark is inseparable from the particular thing which gives it its value.

It is said that the trade-mark did not pass because it is not subject to levy under an attachment. That is not the test, conceding, for the sake of the argument, that it is not leviable.

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The statute of exemptions *does not expressly exempt* a trademark, and therefore the clause in the assignment on which Mr. Dart's counsel relies does not apply. The assignment does not except property which is not subject to levy, but property which the exemption act declares to be exempt.

I think the examination should proceed. I have indicated the scope of the examination. In settling the order I will explicitly state what shall be the subject and the extent of the examination. I shall not grant nor give leave for an application to any other judge for a stay of proceedings. Both parties may submit forms of an order drawn in conformity with the views above expressed.

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN SWINBURNE agt. THE ALBANY
MEDICAL COLLEGE.

Albany Medical College — Appointment and removal of a professor — Legality of meeting of board of trustees — Mandamus.

"The Albany Medical College" was created a corporation by and organized under chapter 26 of the Laws of 1839. The board of trustees is composed of twenty-five persons, and by section 4 of the act such trustees are authorized "to appoint the professors and such other instructors as they may deem necessary, subject to a removal by a vote of two-thirds of the members constituting said board, when found expedient and necessary." The relator was, on February 8, 1876, duly appointed a professor, which position he accepted and continued to discharge its duties until January, 1880. On January 2, 1880, a meeting of the trustees was held at which the professorship which the relator held was abolished by a vote of fifteen to four, nineteen members only being present. The only notice of the meeting was by postal card addressed to each of the trustees. By the statutes of this state (*vol. 1 of Edm. ed., page 406; vol. 2 of 6th ed., page 12*) it is provided: "The trustees of every college to which a charter shall be granted by the state shall be a corporation." Provision is then made for the meetings of trustees, and it is enacted: "Notice of the time and place of every such meeting shall be given in a newspaper printed

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in the county where such *college* is situate, at least six days before the meeting ; and every trustee resident in such county shall be previously notified, in writing, of the time and place of such meeting." On *mandamus* to compel the college to reinstate the relator :

Held, first. That the provisions of the statute above quoted do not refer exclusively to "literary colleges," but are applicable to *every* college, and consequently the meeting of the trustees, at which the relator's professorship in the medical college was abolished, was illegal, because notice of such meeting was not published as required by statute.

Second. That though the act attempted to be done is called the abolition of the professorial chair, its effect being to remove the relator from office, the provision of the charter requiring a two-third vote was applicable.

Third. That the acceptance of the relator's services for four years as a professor cured the irregularity of the original appointment, if any there was.

Fourth. That *mandamus* is the proper remedy.

Albany, Special Term, July, 1881.

Henry Smith and *F. J. Swinburne*, for relator.

Amasa J. Parker, for respondent.

WESTBROOK, J. — "The Albany Medical College" was created a corporation by and organized under chapter 26 of the Laws of 1839.

The board of trustees is composed of twenty-five persons, and by the act aforesaid (*sec. 4*) such trustees are authorized "to appoint the professors and such other instructors as they may deem necessary, subject to a removal by a vote of two-thirds of the members constituting said board when found expedient and necessary."

The relator Dr. John Swinburne was on the 8th day of February, 1876, duly appointed professor of fractures, dislocations and clinical surgery in said college, which position he accepted and continued to discharge its duties until January, 1880.

On January 2, 1880, a meeting of the trustees was held at which the relator alleges only nineteen were present, and by

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a vote of fifteen to four, as he also claims, the professorship which the relator held was abolished.

The respondent, however, insists that twenty-one trustees were present at such meeting and that seventeen voted in favor of the resolution abolishing the professorship.

It is conceded that the only notice of the meeting was by postal card addressed to each of the trustees, and that Dr. S. Vanderpoel, who was one of the trustees and also a professor, voted for the resolution of which the relator complains.

The principal question which this application presents is, was the meeting of the board of trustees legally called and held?

There can be no dispute but that "The Albany Medical College" (*chap. 26 of Laws of 1839*) is a corporation, and also, as its name imports, a college.

By the statutes of this state (*vol. 1 of Ed. ed., page 406; vol. 2 of 6th ed., page 12*) it is provided: "The trustees of every college to which a charter shall be granted by the state shall be a corporation." Provision is then made for the meeting of trustees and it is enacted: "Notice of the time and place of every such meeting shall be given in a newspaper printed in the county where such college is situated at least six days before the meeting, and every trustee resident in such county shall be previously notified in writing of the time and place of such meeting."

It is argued, however, in behalf of the respondent that the provision of the statute which has been quoted refers only to "literary colleges," and that chapter 15 of part 1 of the Revised Statutes, of which it is a part, is not made applicable to "The Albany Medical College," but (*sec. 8 of charter*) the eighteenth chapter is.

The eighteenth chapter of part one of the Revised Statutes is entitled "Of Incorporations" (*1 Ed. ed., page 135*) and did not contain the pages referred to by the counsel for respondent (*pages 474, 475 and 476 of vol. 2*) which are in the sixth edition. That edition was not a compilation by legislative

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authority, but its compilers have grouped, for convenience of reference, under what they deemed the appropriate parts of the Revised Statutes such laws as they saw fit. Indeed, the whole of article 2 of title 11 of chapter 18 of the first part of the Revised Statutes entitled "Of the Incorporation of Academies and other Institutions of Learning" and contained in such sixth edition is simply chapter 184 of the Laws of 1853, and which had no existence when "The Albany Medical College" was incorporated, and the same is not now and never was any part of the Revised Statutes proper; and section 34, page 491 of volume 2 of the sixth edition (so called) of the Revised Statutes, which the counsel for the college supposes provides for it, is only section 8 of the charter (*chap. 26 of Laws of 1839*), arbitrarily inserted as part of the Revised Statutes, to which it does not belong and of which it forms no part.

As "The Albany Medical College" besides being a college was also a corporation, it was eminently proper to subject it to the provisions of the Revised Statutes entitled "Of Incorporations," as was done by section 8 of its charter, "so far as the same are applicable and have not been repealed," but that fact did not make it any the less liable to these provisions of the general law applicable to "*every* college;" and to it, therefore, because it is a college.

There is also a provision in its charter (*sec. 6*) which declares: "The college shall be subject to the visitation of the regents, and shall annually report to them." A reference to chapter 15 of the Revised Statutes, which contains the provision hereinbefore quoted (1 *Ed.'s ed.*, 406, *sec. 33*) in regard to the giving of notice of a meeting of the board of trustees of "*every* college," will show that article 1 of that chapter (1 *Ed.'s*, 402) is entitled "Of the Organization and Powers of the Board of Regents," and such board of regents is empowered (1 *Ed.'s*, 404, *sec. 19*) to confer the "degree of *doctor* of medicine," which degree, when thus bestowed, "shall authorize the person on whom it is conferred to practice physic and

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surgery in this state." These facts and the further one that the general law, under which medical colleges may now be incorporated (*chap. 184 of Laws of 1853, and also incorporated in vol. 2 of 6th ed. of R. S., p. 473, &c.*) is entitled "An act relative to the incorporation of colleges and academies," conclusively show that chapter 15 of the first part of the Revised Statutes, and article 2 thereof, do not refer exclusively, as the counsel for the respondent insists, to "literary colleges," and that consequently the meeting of the trustees at which Dr. Swinburne's professorship in the Medical College was abolished was illegal, because notice of such meeting was not published, as required by the statute.

It is argued, however, that there were twenty-one trustees present at the meeting, and as seventeen voted for the resolution abolishing the professorship, the failure properly to call the meeting, and the non-attendance of the others, made no difference in the result. To this position there are two plain answers: First. It was no meeting of trustees, as such, unless properly called; and, second, if the three other trustees had been present we do not know what the result might have been. Their presence, their statements and arguments, might possibly have changed the entire conclusion.

The fact, too, that there was no legal meeting of the trustees answers the argument that, as Dr. Swinburne was not removed from his professorship, but the professorship was abolished, it could be done by less than a two-third vote. It would, however, be difficult to show the distinction claimed. The truth is Dr. Swinburne was in fact removed from office, though the trustees did not so style their action. The courts deal with things, no matter by what names they are disguised; and though the act attempted to be done is called the abolition of the professorial chair, its effect being to remove Dr. Swinburne from office, the provision of the charter requiring a two-third vote was applicable.

It is said that for the meeting of trustees at which Dr. Swinburne's professorship was created no notice had been

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published. If this be claimed as a precedent, it is sufficient to quote the old adage that "two wrongs do not make one right;" if, however, it be argued that Dr. Swinburne was not, for that reason, legally appointed a professor, the answer is clear that the acceptance of the doctor's services for four years as a professor cured the irregularity of the original appointment, if any there was.

There were other points made upon the argument which I have not deemed it necessary to discuss. It may be proper, however, to say that the provision of the Revised Statutes (1st ed., p. 410, sec. 50) which declares "no professor or teacher of any incorporated *college* or academy shall be a trustee of *such college* or academy," is amended by chapter 132 of Laws of 1876 to read as follows: "No professor or tutor of *any incorporated academy* shall be a trustee of *such academy*." There was, therefore, no valid objection to Dr. Vanderpoel as a trustee because he was also a professor.

Neither do I deem it necessary to discuss the propriety of the remedy by *mandamus*. Objections of this character never strike me with favor. If a court has jurisdiction of the subject-matter and of the parties by any of the modes known to the law, there is no reason why it should not exercise its powers to undo a wrong; but the objections to the remedy in this instance are answered fully by the cases cited by the counsel for the relator.

The *mandamus* asked for must be granted.

People *ex rel.* King agt. McEwen.

ALBANY RECORDER'S COURT.

PEOPLE *ex rel.* JAMES B. KING agt. JOHN McEWEN, as
Superintendent of the Albany Penitentiary.

Criminal law — From what time a sentence to imprisonment takes effect.

A sentence to imprisonment takes effect only from the first day of actual incarceration, and not from the day when sentence is pronounced.

May, 1881.

GOULD, J. — James B. King, the relator herein, having been duly convicted by a court of sessions, held in and for the county of Warren, upon an indictment for keeping a disorderly house in the town of Queensbury in said county, was, on the 13th day of October, 1880, sentenced by said court to be imprisoned in the Albany County Penitentiary for the term of six months, and to pay a fine of \$250, and to stand committed until the fine was paid.

A writ of error and stay of proceedings having been obtained by his counsel, the case was carried first to the general term and then to the court of appeals, King being let to bail in the meantime. In both instances judgment was affirmed, and on the 15th day of March, 1881, he was brought to and confined in the Albany Penitentiary.

On the 19th day of April, 1881, on petition of relator, a writ of *habeas corpus* was allowed by me, directed to the superintendent of the Albany County Penitentiary, commanding him to have the body of the relator, with the time and cause of his imprisonment, before me at my chambers forthwith.

The superintendent returned that he held the relator by virtue of a warrant of commitment, a copy whereof was annexed to the return, and the original was produced. Proceedings were adjourned to the twenty-eighth, when relator's

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counsel traversed the return and moved for his discharge from custody upon the following grounds :

First. That the term of his imprisonment had expired and his fine had been paid.

Second. That the warrant of commitment is void upon its face.

In regard to the first point, upon examination of the authorities cited upon both sides, it appears that the question as to when the time of imprisonment commenced to run has never been judicially determined in this state, though in the opinion furnished by counsel for the relator remarks *obiter dicta* would seem to indicate that the day when sentence is pronounced must be regarded as its commencement. Nevertheless, since these are not direct adjudications, I cannot allow them to change my conviction that such a rule would be unjust, discriminating only in favor of those able to employ counsel and interpose all the delays of punishment known to the law. In fact, in many cases, if this were so, no loss or penalty would accrue to the criminal rightly convicted, save the worry and expense of litigation. Judge FOLGER, in *People ex rel. Stokes agt. The Warden, etc., of Sing Sing* (66 N. Y., 345), says : " Punishments for the commission of crime is that pain or forfeiture which the law exacts and the criminal pays or suffers for the offence. The conviction having been legal, and the sentence in accordance with the law, it follows that the state may exact from him the full endurance of the sentence and every part of it."

How can this be, if by means of a prolonged writ of error, stay of proceedings, and bail pending the result, his term of imprisonment has expired before a rightful conviction has been affirmed, and he thus escapes all punishment. Such a rule as this would be a direct inducement to criminals to sue out writs of error ; would complicate the machinery of justice, and would regulate the term of imprisonment when imposed by the tenacity and ingenuity of the culprit's counsel. Writs of error are safeguards to the innocent, not to the guilty. They

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prevent unlawful and erroneous convictions, but they should not become the means of nullifying penalties justly exacted.

In regard to the second point, the warrant of commitment is certainly not regular. I do not, however, regard it as void upon its face. It contains the requisite facts, and more, which latter may be regarded surplusage. Its irregularities can cause no uncertainty; the guilt of the prisoner is unquestioned, and I therefore consider it, though subject to criticism in form, sufficient to hold him. I therefore dismiss the writ of *habeas corpus*, deny the motion above stated and remand the relator to the custody of the superintendent of the Albany County Penitentiary.

SUPREME COURT.

HANNAH M. PERRY agt. JOHN FOSTER and EMELIA FOSTER,
as surviving trustees under the will of JAMES FOSTER,
deceased.

Action—by a cestui que trust under a will against the trustees appointed thereunder for an accounting and for removal of one of them—Answer—Demurrer to answer—a detailed statement of facts in answer by which a certain conclusion is reached, though set up as separate defenses are not good grounds of demurrer—The provisions of Revised Statutes in relation to uses and trusts do not apply to trust \approx personal property—Counter-claim set up in answer good as against demurrer, if it tends to diminish or defeat recovery.

Where plaintiff, as a *cestui que trust* under a will, brings suit against the two trustees appointed thereunder for an accounting and for the removal of one of them, alleging that defendants were directed by the will to invest \$40,000 and pay her the income for life, and that they paid her for several years various sums, represented to be such income, but that they had, since April, 1879, refused to make such payment:

Held, that as defendant's denial in his answer, that he ever received the \$40,000 referred to, from the estate, raises an issue as to plaintiff's right to demand an accounting, and his removal as trustee, the detailed statements of facts by which such conclusion is reached, though set up as separate defenses, are not good grounds of demurer. If found exple-

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tive or redundant, they should be expunged by motion. And as plaintiff, by her demurrer to such statements of fact, admits that she and her mother received \$10,000 under a mistaken interpretation of said will, for her fair share or proportion of which she is liable to the defendant, and that for the purpose of securing payment of such liability, she and her mother assigned to defendant their share in the estate, by virtue of which defendant counter-claims the moneys advanced by him, such counter-claim being allowable under section 501 of the Code, and the trust fund in dispute being personal property, the provisions of the Revised Statutes in relation to uses and trusts do not apply; and such fund being therefore answerable under certain conditions of fact, to the claims of a creditor, though the counter-claim, as pleaded, may not, if proved, entitle the defendant to a judgment on the trial, yet the demurrer should be overruled, as such counter-claim may tend to diminish or defeat the plaintiff's recovery.

Special Term, November, 1881.

Grosvenor P. Hubbard, for plaintiff.

Samuel Jones and *James F. Malcolm*, for defendant.

LARREMORE, J. — Plaintiff, as a *cestui que trust* under the will of James Foster, deceased, sues for an accounting and for the removal of the defendant, John Foster, as trustee thereof. The complaint alleges that by said will the defendants were directed to invest the sum of \$40,000, and pay over the income thereof to plaintiff during her natural life. That the defendants have received said sum from the estate of said James Foster, and have paid to her for many years prior and up to April, 1879, various sums of money which the defendants represented to her to be the interest and income arising from such investment. That since the date last named the defendants have neglected and refused to pay to her any part of such income, although she has duly demanded the same; wherefore she asks judgment as above stated.

The defendant John Foster in his answer denies that he had received the alleged trust fund, or that he ever represented that the various sums of money paid by him to the

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plaintiff were the income or interest of any investment of such fund. He avers, as a separate defense, that a sum of \$40,000 given by said will to the defendants in trust for Robert C. Foster (a brother of plaintiff), was, upon said brother's decease, paid to this plaintiff and her mother, the other defendants herein, under the belief that said sum lawfully belonged to them. That by judicial proceedings subsequently taken, it was decided that the plaintiff was not entitled to more than one-quarter of said sum, and the defendant claims that at least \$20,000 of said sum last mentioned, with interest thereon, should be deemed as a payment in advance of the income or interest accruing from and after April 1, 1879, on the \$40,000 named in the complaint herein, and which said sum of \$20,000 he counter-claims against any sum adjudged to be due the plaintiff.

For a further and separate defense, it is alleged that on February 22, 1870, the plaintiff and her mother—the codefendant herein—by an instrument in writing of that date, in consideration of any advance that they or either of them might receive from defendant as executor of the will of said James Foster, consented and promised to pay back the same to him in case a demand should at any time be made upon him by any person lawfully entitled thereto; that on May 25, 1875, the plaintiff and her mother, by an instrument under their hands and seals—after reciting the said will and provisions therein contained, that defendant had made certain advances of money to them, and that they had requested further advances from him, and had agreed to pay the same on demand, with interest; that such amounts might be charged against and deducted from any moneys due or to become due under said will, and for the purpose of securing payment thereof—assigned and transferred to the defendant all their share and interest in the estate left to them by said will; that the defendant has advanced to the plaintiff and her mother divers sums, amounting to \$40,000, \$20,000 of which he counter-claims against the plaintiff's alleged demand.

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Defendant further avers that it was provided and directed by said will, that for the purpose of carrying it into full effect the executors thereunder — with the consent in writing of his codefendant — were empowered to sell the testator's real estate; that at the time of his death the same was largely incumbered and had greatly depreciated in value, and that if the same had then or at any time prior to the year 1865 been sold, it would not have produced, together with the personal estate, much more than its incumbrances and the debts due and owing by the testator; that portions of said real estate were sold as pressing necessity required, until all such debts and incumbrances (save one of \$2,650) had been discharged; that after such payments, and the setting apart of the \$40,000 directed to be done by the second clause of said will for the benefit of Robert A. Foster, there remained no funds wherewith to make the investment of \$40,000, provided by the third clause of the will in behalf of the plaintiff; that to provide the requisite funds therefor a sale of some portion of such real estate will be necessary, which sale the defendant is ready and willing to make, but to which his codefendant and this plaintiff object.

To the second defense the plaintiff demurs as insufficient in law. She also demurs to the counter-claim set up in the answer as not authorized by section 501 of the Code of Civil Procedure, and that the same does not state facts sufficient to constitute a cause of action.

The defendant denies that the \$40,000 referred to in the complaint has ever been received by him from the estate, or that he ever represented to plaintiff that the various sums of money paid to her by him was the interest or income arising therefrom. This raises a distinct issue as to the plaintiff's right to demand an accounting and the removal of defendant as trustee. All detailed statements of facts by which such conclusion is reached are not good ground of demurrer. If found to be expletive or redundant they should be expunged by motion.

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Section 501 of the Code allows a counter-claim to be interposed which arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.

The plaintiff, by demurring, admits that she and her mother have received the sum of \$40,000, under a mistaken interpretation of said will, for her fair share or proportion, of which she is liable to the defendant. She also admits that she, in connection with her mother, in an instrument reciting the will and its provisions, that defendant had made certain advances of money to them, and that they had requested further advances from him, agreed to pay the same on demand, with interest, and thereby (for the purpose of securing payment thereof) assigned to the defendant all their share and interest in their estate under the will, by virtue of which assignment the defendant counter-claims the moneys advanced by him.

There can be no doubt of the intention of the parties in this respect, nor that it arose out of the transaction set forth in the complaint, and was "connected with the subject of the action."

The main obstacle raised by the demurrer is that the interest of the plaintiff under the will, being that arising from a trust fund, was inalienable and not subject to her individual disposition.

The trust fund created by the will must be regarded as personal property (*Savage* agt. *Burham*, 17 *N. Y.*, 561; *Bunn* agt. *Vaughan*, 1 *Abb. Ct. Appeals*, sec. 253.)

The question then occurs whether or not the provisions of the Revised Statutes (*title 2, chap. 1, part 2*) in relation to uses and trusts apply to a trust of personal property. Great contrariety of opinion seems to exist upon this point (*See cases last cited; also Kane* agt. *Gott*, 24 *Wend.*, 641; *Graff* agt. *Bennett*, 31 *N. Y.*, 9; *Williams* agt. *Thorn*, 70 *id.*, 270; *In re Howell*, 61 *How. Pr.*, 179, and cases there cited; *Grout* agt. *Van Schoonhoven*, 1 *Sand. Ch.*, 336; *Arnold* agt. *Gilbert*, 5 *Barb.*, 190; *Cruger* agt. *Cruger*, 5 *id.*, 225).

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The weight of authority leans to the conclusion that the trust fund in dispute is personal property, not within the restriction of the statute, and answerable under certain conditions of fact to the claim of a creditor.

The counter-claim as pleaded may not, if proved, entitle the defendant to a judgment on the trial, but if it tends to diminish or defeat the plaintiff's recovery it is good as against her demurrer, which should be overruled.

N. Y. COMMON PLEAS.

JOHN C. STRUVE agt. CARSTEN DROGE.

Trespass—Damages for, in case of supposable fire—Rule of damages in such case.

In a case of public necessity to prevent the spreading of a fire any individual may demolish a building without being responsible in trespass or otherwise.

If, however, such public necessity does not exist, and in point of fact there is no need of the destruction, the person who commits the act is responsible in damages.

But see *The People* agt. *Shorter* (2 N. Y., 193).

General Term, November, 1881.

APPEAL from a judgment of a district court in the city of New York, in favor of the defendant and against the plaintiff, dismissing the complaint, with ten dollars costs.

The action was for trespass and damages. Plaintiff was a fresco painter and defendant was his landlord and occupied adjacent apartments to those of the plaintiff. On the day in question he left his premises as usual in the morning, closed the window and locked the door, leaving his sketches, drawings and materials in his rooms. Upon his return in the evening he found one of his doors had been broken open and

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his property damaged to the extent of ninety-five dollars and seventy cents. Defendant noticed smoke in front of plaintiff's window; he knocked at plaintiff's door, there was no response; he then forced open a side door and went in, he saw there was no fire and left. It turned out that the smoke came from a neighboring chimney. The justice in rendering judgment for the defendant said: "I find from the evidence that is before me that the defendant broke open the plaintiff's door; that he committed the damage alleged; that there was an appearance of fire in the plaintiff's apartments from which apartments plaintiff was then absent; that defendant believed the premises were on fire; that his motive in breaking open the door was to subdue the fire and protect his own property as well as of the plaintiff's; that such act was lawful and justifiable; that the damage committed was accidental and with no intent to perpetrate a wrong, but followed the opening of the door; that the breaking open of the door was justifiable in law."

George F. & J. C. Julius Langbein made and argued the following points on behalf of the plaintiff, appellant:

I. The law makes no distinction in actions of this character as to whether the defendant's act was intentional or not. The intent, belief and motive makes no difference as regards the liability; that question only arises as to the measure of damages. Trespass lies if the act of the defendant causes injury whether the act be intentional or not (*Percival* agt. *Hickey*, 18 *Johns.*, 257; *Guille* agt. *Swan*, 19 *Johns.*, 381; *Castle* agt. *Duryee*, 41 *N. Y.*, 169; *Dygert* agt. *Bradley*, 8 *Wend.*, 469; *Vanderburg* agt. *Truax*, 4 *Denio*, 465).

II. The entry by the defendant on the premises of the plaintiff and breaking open his door was in law a trespass. Every unlawful entry upon the premises of another is a trespass for which he is liable even though no damages are shown; and whether the owner suffers much or little he is entitled to recover some damages (*Dixon* agt. *Clow*, 24 *Wend.*, 188;

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Stewart agt. Wells, 6 *Barb.*, 79; *Sedg. on Dam.*, p. 133; *Shannon agt. Burr*, 1 *Hilt.*, 40; *Parker agt. Griswold*, 17 *Conn.*, 288; *Blake agt. Jerome*, 14 *N. J.*, 406; *Browne on Actions at Law*, p. 369).

III. Even though the entry by the defendant upon the premises of the plaintiff was committed under an honest though mistaken belief, he is still liable in trespass. The rule is that if the injury be occasioned by an unavoidable accident, no action will lie for it, but if any blame is imputable to the defendant, though he had no intention to injure the plaintiff or any other person, he is liable for the damages sustained (*Dykert agt. Bradley*, *supra*; *Weaver agt. Ward*, 1 *Hobert*, 134; *Learne agt. Bray*, 3 *East*, 593; *Wakeman agt. Robinson*, 1 *Bingham*, 213; *Percival agt. Hickey*, *supra*; *Bullock agt. Babcock*, 3 *Wend.*, 391; *Center agt. Finney*, 17 *Barb.*, 99; *Vincent agt. Stinehorn*, 7 *Vermont*, 64; *Brower agt. Neal*, 36 *Maine*, 407; *Waterman on Trespass*, vol. 1, sec. 2; *Alaback agt. Utt*, 51 *N. Y.*, 651).

IV. The defendant having committed a trespass under an honest mistake, without any intention of injuring the plaintiff's property, is still liable for the actual damages committed. For an involuntary trespass or one committed under an honest mistake without intent to injure, the damages should be confined strictly to compensation for the injury sustained; and in estimating the amount of such damages all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, pain, insult or inconvenience. But unless the trespass is willful or committed in reckless or wanton disregard of another's rights or accompanied by circumstances showing malice or a corrupt motive, vindictive or exemplary damages should not be given (*Ives agt. Humphrey*, 1 *E. D. Smith*, 197; *Shanna agt. Burr*, 1 *Hilton*, 41; *Lane agt. Wilcox*, 55 *Barb.*, 618; *Walrath agt. Redfield*, 11 *Barb.*, 368; *Worth agt. McDonald*, 47 *Barb.*, 535; *Armstrong agt. Percy*, 5 *Wend.*, 535; *Crane agt. Peters*, 6 *Hill*, 522; *Downer agt. Madison Co. Bank*, 6 *Hill*, 648).

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G. S. Van Pelt made and argued the following points on behalf of the defendant, respondent :

I. The fact being settled that the defendant had good reasons to believe there was a fire in plaintiff's room, and that he acted without malice or intent to injure the plaintiff, he was justified in breaking open the door ; nay, it was his duty to do so, in the absence of the occupant. He was the landlord of the whole house, and was obliged to protect his own and his tenant's property as far as he was able. It is a very ancient rule of the common law that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire or any like danger is not a trespass (*Proctor* agt. *Adams*, 113 *Mass.*, 376).

II. The defendant had a right to protect his property by the acts done. A trespass is an unjustifiable interference with intent to injure plaintiff, and such must be shown to sustain this action of trespass (*Mahan* agt. *Brown*, 13 *Wend.*, 261).

III. The defendant had a reversionary right to the premises occupied by the plaintiff, and therefore he had a legal right to enter to prevent damage by fire (*Phelps* agt. *Nowlen*, 72 *N. Y.*, 39).

IV. The rule of *damnum absque injuria* applies to this case, and therefore cannot be the ground of an action.

VAN HOESEN, *J.* — The plaintiff's rooms were not on fire, though the defendant supposed they were. The defendant, who occupied adjacent apartments, broke into the plaintiff's room, and in doing so committed some damage, to recover for which this action is brought. The sole question is, is he liable? The law seems to be this, that in a case of public necessity, to prevent the spreading of a fire, any individual may demolish a building without being responsible in trespass or otherwise. If, however, such public necessity does not exist, and in point of fact there is no need of the destruction, the person who commits the act is responsible in

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damages (*Addison on Torts* [*Dudley & Baylis' ed.*], p. 1306).

In the *Mayor of New York* agt. *Lord* (18 *Wend.*, 132) chancellor WALWORTH said "that when it became necessary to destroy the property of an individual to prevent the ravages of a fire, the persons who did the destructions were protected from personal responsibility where they could show that the destruction of the property was necessary to produce the effect, but that they were, by the common law, bound at their peril to decide correctly as to such necessity to protect themselves from liability to make good the loss."

In *Taylor* agt. *Plymouth* (8 *Metc.*, 462) chief Justice SHAW uses language of the same import. If this be the law, it follows that the judgment of the district court must be reversed. I am aware that an argument may be framed to support the proposition that the person who does the injury should be protected if he breaks into a house under such circumstances that a jury could say he had good and reasonable ground for believing that there was a fire in it likely to get headway to adjoining property, even though it might afterward appear that there was in fact no fire, and that he had been deceived by appearance. Such an argument might possibly find some support in the case of the *People* agt. *Shorter* (2 *N. Y.*, 193).

Judgment reversed.

JOSEPH F. DALY, J., concurred.

Fisher agt. Langbein.

SUPREME COURT.

JOHN FISHER agt. GEORGE F. LANGBEIN and J. C. JULIUS
LANGBEIN.

Action against attorneys for false imprisonment—Law as to liability of attorneys stated—Not liable for error of court where there is jurisdiction of the person and of the subject-matter of the action—Sheriff's risks and hazards.

An attorney and counselor-at-law is not liable in an action for false imprisonment where, in a judicial proceeding, he presents papers to a court of competent jurisdiction, and the court, after consideration and after hearing and acting judicially upon the papers, grants an order of arrest, and such papers are afterward set aside upon the ground of error in issuing them. That error of the court not only protects the attorney, but everybody else. The attorney is only liable for irregularity in practice.

It is one of the risks and hazards of the sheriff's office to determine at his peril whether he can or cannot further detain a party in his custody under a certain writ or process (*See Fisher agt. Raab et al.*, 56 *How.*, 218, 223 ; 58 *How.*, 221 ; 81 *N. Y.*, 235).

Special Term, November, 1881.

THE complaint alleged that the defendants were attorneys and counselors-at-law, and that the plaintiff had commenced an action in the court of common pleas for the city and county of New York against one John Raab and others, and that the defendants appeared and answered as the attorneys and counselors of said Raab and forty-one other defendants in that action. That defendants maliciously procured a false affidavit to be made, wherein the plaintiff was falsely charged with having committed an alleged contempt of said court of common pleas, and that the said affidavit was presented by them to judge JOSEPH F. DALY, one of the judges of said court, for an order adjudging him guilty of contempt of court; that said judge made such an order upon said affidavit and application, whereupon the defendants wrote out a

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commitment and warrant for the commitment of the plaintiff, and caused the same to be issued to the sheriff of the city and county of New York, who, in obedience thereto, arrested the plaintiff and committed him to the common jail of the city and county of New York. That at the time of such arrest the plaintiff was employed as finisher in a machine shop, and earned ten dollars a week; that he thereby lost his situation and had to endure great hardships and indignity. That the plaintiff thereupon appealed from said order of judge DALY to the general term of the court of common pleas, where said order was affirmed, and from there to the court of appeals, where said order of judge DALY and of said general term were reversed.

That said order of judge DALY was without lawful authority and jurisdiction, and was unconstitutional and void, and that by reason of the premises he has suffered damages to the amount of \$30,000.

The defendants answered separately. The answer of George F. Langbein admitted that he was an attorney and counselor-at-law, and while admitting the proceedings set forth in the complaint as to the action in the court of common pleas, and the appeals in said complaint mentioned, he denied all allegations of malice. For a further and distinct defense he alleged that this action was brought by the plaintiff, by and under an agreement with his attorney and counselor in this action, Henry Wehle, proposed by said Wehle and accepted and agreed to by said plaintiff; said Wehle, for the purpose of inducing the plaintiff to place the alleged claim in the complaint mentioned in his hands for prosecution, agreed not only to render the services as attorney and counselor-at-law in this action, but also to advance all the money needed by the plaintiff to prosecute and carry on this action, and that the plaintiff agreed to and accepted the same, and thereupon lent his name for this action, and said action was commenced by the said Wehle pursuant to said agreement and not otherwise, contrary to and in violation of section 74 of the Code of Civil Proceed-

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ure, and contrary to and in violation of its spirit and intent and of public policy. The answer further alleged that the plaintiff was not the real or the sole party in interest, but that said unlawful agreement between the plaintiff and said Wehle, his attorney, was also for the purpose of permitting and allowing said Wehle to attempt to recover the money of said Wehle, advanced and paid by him as attorney for the plaintiff in said action in the court of common pleas and the appeals therein mentioned, contrary to and in violation of the statute (*part 3, title 2, chap. 3, art. 3 of the Revised Statutes of the State of New York*), and of said section 74 of the Code of Civil Procedure.

The separate answer of the defendant J. C. Julius Langbein admitted that he was an attorney and counselor-at-law, and by way of a further defense, and by the way of mitigation alleged and showed :

I. In the month of August, 1878, the plaintiff brought an action in the court of common pleas for the city and county of New York, against one John Raab and about seventy other defendants, to dissolve an association known as the "Kranken under Stützung Verein, Deutsche Freu und Einigkeit," to bring the funds of said association into court, and to distribute the same according to their appropriate share among the members, and for other relief, to which said action and the pleadings therein this defendant begs leave to refer upon the trial of this action. That on the 2d day of September, 1878, the plaintiff obtained from the said court a preliminary injunction, with an order to show cause why the same should not be made perpetual, restraining the said Raab and others, about seventy defendants (said Raab and said other defendants who were restrained being principally the officers and trustees of said association), from drawing and receiving, and the defendant Fischer, as receiver of the Teutonia Savings Bank, from paying out the moneys deposited by said association in said bank, and why a receiver of all the property of said association should not be appointed.

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II. Upon the hearing of said order to show cause forty-two of said defendants (who had retained and engaged this defendant as their attorney-at-law to appear for and defend them in said action, in opposition thereto produced affidavits signed and sworn to by them, and which said affidavits this defendant, as their attorney as aforesaid, as he was in duty bound to do so, read to the court or judge JOSEPH F. DALY to the effect that the plaintiff himself made a motion at a meeting of said society to dissolve the same, and then at a subsequent meeting the plaintiff himself also made a motion to overthrow and cancel his former motion and that the society continue as before. As the effect of these affidavits was to stop the plaintiff from claiming, as he did on said motion, that the said society was dissolved, his attorney, Henry Wehle, attempted to impeach said affidavits, claiming that they were not signed or sworn to understandingly by the said forty-two defendants, inasmuch as they were Germans and did not understand the English language, and therefore had not knowingly signed and sworn to the same, and he thereupon argued and insisted before said court and judge that a referee should be ordered to determine and report upon such facts, to which this defendant, for and on behalf of and on account of the extreme poverty of his clients (the said forty-two defendants), objected and resisted before the said court and judge, and thereupon the question as to who should pay the expenses of the reference was argued and discussed by the defendants as such attorney, and by the said Wehle, as attorney for the plaintiff, who informed said court and judge that the plaintiff would pay them in case the referee's report was not in his favor, whereupon the court and judge JOSEPH F. DALY made an order of reference dated September 17, 1878, which said order is on file in the office of the clerk of the said court, to which this defendant begs leave to refer upon the trial of this action.

III. That after a long protracted and tedious litigation before said referee that officer made his report against the plaintiff upon the matters aforesaid, and in favor of the forty-

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two defendants for whom this defendant was acting; that the referee served a notice; that his report was ready for delivery upon the plaintiff, the said Wehle, upon Charles Goldzier, attorney for about eleven defendants seeking affirmative relief, and upon this defendant; that said notice is on file in the office of the clerk of the said court, and to which this defendant begs leave to refer on the trial of this action; that no notice was taken or paid to said notice of the referee, whereupon this defendant, as in duty bound and by the direction of the said court judge JOSEPH F. DALY aforesaid, made the affidavit which was sworn to by this defendant on the 27th day of November, 1878, and which is the affidavit referred to in the third paragraph of the complaint herein, that said affidavit was true then, and this defendant reiterates and swears it is true now and was not then false, nor that the said affidavit was not made, signed or sworn to, either maliciously, falsely or wrongfully, as against the plaintiff, but was signed and sworn to in perfect and entire good faith by this defendant in the lawful, proper and honest discharge of his duty as the attorney for said forty-two defendants and for and on their behalf and benefit and in their interest while performing, discharging and attending to his legal professional duties aforesaid, and not otherwise, and to simply and plainly submit to the court by its directions, as aforesaid, and lay before it the facts in said matter pursuant to this defendant's legal professional duty and the direction of said court, judge JOSEPH F. DALY, for the judicial action of the said court and judge thereon.

IV. That thereupon this defendant in the discharge of his said duty, and pursuant to the direction of said court, and without any malice or wrongful intent towards the plaintiff, submitted to and laid before the said court the facts in said matter and presented the same in said affidavits, together with the other papers, to the said court, and said court on said facts as thus presented to it, and on said 27th day of November, 1878, made an order directing the plaintiff to pay to the

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said referee his fees within three days from the date of said order or show cause at a time stated therein why he should not be committed for contempt, which said order, together with all the papers therein recited, are on file in the office of the clerk of the said court, and to all of which this defendant begs leave to refer upon the trial of this action. That upon the return and hearing of said order the plaintiff appeared by said Wehle, as his attorney, and did not deny the fact that the referee had found that a majority of the said forty-two defendants had sworn that they had understandingly made the statements which appeared in their said affidavits, but merely raised technical objections as to the practical part of the procedure thereupon; whereupon the said court, on the 4th day of December, 1878, upon the facts before said court and on the said hearing, found and stated the facts and expressed its judicial views in writing in an opinion which is on file in the office of the clerk of said court, a copy of which opinion this defendant annexes hereto and makes it part of his answer, and marks it "A." That thereupon this defendant, to carry out the judicial views of the said court and in the lawful and proper discharge of his duty as such attorney aforesaid, in entire good faith and without any malice or wrongful intent towards the plaintiff whatsoever, and under the direction of said court and judge, made and dated December 4, 1878, and which is the order referred to in the fourth paragraph of the complaint herein, and is marked "A." That thereupon and on the said 4th day of December, 1878, this defendant, as such attorney and in the lawful and proper discharge of his duty as such, and without any malice or wrongful intent whatsoever towards the plaintiff, to carry out the order of said court, and for the purpose of carrying the said order into effect, drew the warrant for the clerk of said court, pursuant to the order of said court of December 4, 1878, whereupon the clerk of said court signed and sealed the same, as he was in duty bound to do; and pursuant to the order of the said court, the said warrant was issued to the sheriff of

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the city and county of New York, who, as this defendant is informed and believes, in obedience thereto, duly conveyed the plaintiff to the common jail of the city and county of New York, and said warrant is the one referred to in the fifth paragraph of the complaint herein, is thereto annexed and marked "B."

V. That thereupon the said Wehle, as attorney aforesaid, obtained a writ of *habeas corpus* from the supreme court, New York (first department), and said court judge JOHN R. BRADY, after argument upon the merits, dismissed the said writ, with costs, the court writing an opinion, which is on file with the clerk of said supreme court, a copy of which is hereto annexed, made part of this answer and marked "B."

VI. That thereupon the said Wehle, as attorney aforesaid, obtained another writ of *habeas corpus* from the said supreme court. Presiding justice NOAH DAVIS, after argument upon the merits, dismissed said writ, with costs. The said order of dismissal is on file with the clerk of said supreme court, to which this defendant begs leave to refer upon the trial of this action. That neither of said orders of dismissal were ever appealed from, were never reversed and are still valid and in full force and effect.

VII. That on the 17th day of December, 1878, the plaintiff appealed from the said order of December 4, 1878, to the general term of the court of common pleas for the city and county of New York, and pending said appeal made a motion to the said court or judge for a stay of proceedings, upon which application the said court or judge made a memorandum or opinion for counsel, which is on file with the clerk of said court, a copy of which is hereto annexed, marked "A 1," and is made part of this answer; that said court reversed said order upon the technical ground that the person who made the demand for the referee's fees did not, when making such demand, exhibit his authority to collect the money, and that ground being of a purely technical nature, the said court exacted that the plaintiff should give a stipula-

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tion not to sue on account of his imprisonment. The said court wrote an opinion on said reversal, which is on file with the clerk of said court, a copy of which is hereto annexed, marked "C," and made part of this answer; that the plaintiff refused to give such stipulation, whereupon the said court (general term) affirmed the said order of December 4, 1878, with costs, which order of affirmance is on file with the said court, and to which this defendant begs leave to refer upon the trial of this action. That thereupon the plaintiff appealed from said order of December 4, 1878, and from said order of affirmance dated January 19, 1880, to the court of appeals of the state of New York, and said last mentioned court reversed the said orders appealed from, writing an opinion, a copy of which is hereto annexed marked "D," and is made part of this answer. That thereupon, in the month of November, 1880, the plaintiff commenced this action against this defendant and the codefendant, and the facts and matters aforesaid are the matters of which the plaintiff complains in his complaint herein.

This defendant specially avers and alleges that from the commencement of said action by the plaintiff against the said John Raab and said about seventy other defendants, and up to and including this time, he has not had or entertained, nor has he now nor does he now entertain any malice or wrongful intent, either personally or otherwise, against the plaintiff; that all the acts, doings and proceedings in said matter and action toward the plaintiff, from the commencement thereof up to and including the present time, were done and performed by him, this defendant, in entire good faith, as the attorney for the said forty-two defendants, and under the direction of, and to carry out the judicial views of the said court and judge, and in the lawful and proper discharge of his duty as such attorney and as an officer of said court, and without any malice or malicious or wrongful intentions whatsoever toward plaintiff herein. After the plaintiff had rested

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his case a motion was made to dismiss the complaint, upon the ground that no cause of action had been proven.

Jesse K. Furlong appeared for defendant.

J. C. Julius Langbein, George F. Langbein appeared for themselves in person.

Cardozo & Newcombe appeared as counsel for defendants.

Ex-judge CARDOZO, on the motion to dismiss, made and argued the following points :

I. The defendants acted in good faith as attorneys and counselors of this court, without fraud, falsehood or malice towards the plaintiff, and are therefore not liable. The foundation on which the liability of a person for malicious arrest must rest is, that the party obtaining the order or authority from a judge for the arrest has imposed upon the latter by some false statement, some *suggestio falsi, suppressio veri*, and has therefore satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit fairly stating the facts, the party succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest him, he is not liable to an action, though the defendant had no such intention (*See Reg. Gen. Mich. T.*, 1869 *R.*; 6 *L. R.*, 5; 2 *B.*, 670, 671). The discharge of the defendant affords no ground of action against the party procuring the arrest if the original order for the arrest was fairly obtained, as it is a judicial act, and a person concerned in enforcing it is not responsible for its correctness. Where, however, the facts are not truly stated, and the court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit or procuring the order for the arrest was guilty of falsehood or of culpable

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negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages (*Daniels agt. Fielding*, 16 *M. & W.*, 207; *Gibbons agt. Allison*, 3 *Common Bench R.*, 185; *Ross agt. Norman*, 5 *Exch.*, 359; *Addison on Torts*, vol. 2 [*Wood's ed. of 1876*], pp. 83, 84). But if an attorney maliciously and without any reasonable or probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion and affects an unlawful and malicious arrest, he as well as his client, who has authorized the proceeding, will be responsible in damages (*Stockley agt. Hornidge*, 8 *C. & P.*, 16; *Addison on Torts*, vol. 2 [*Wood's ed. of 1876*], p. 85).

II. Parties and their attorneys are liable for issuing void or irregular process, and are responsible for all damages and injury done after it has been set aside by the court or judge, unless it has been set aside for error or on the terms that no action shall be brought. In the case at bar the special term judge erred as to the manner in which referee's fees should be collected under the statute, and this is all that the court of appeals has decided in the case of *Fisher agt. Raab* (81 *N. Y.*, p. 235); *Addison on Torts*, vol. 2 (2 *Wood's ed. of 1876*) p. 144; *Countess of Rutland's case* (6 *Rep.*, 54, a); *Cotes agt. Michael* (3 *Lev.*, 20). If acts of trespass have been committed under color of legal process, which has been set aside as irregular, both the client who commands the attorney and the attorney who sues out the process are responsible as principal in the commission of the acts of trespass done by their procurement and commandment; but it is otherwise if the issue of the process is a judicial act, and the process is afterwards set aside, not for irregularity but for error (*Williams agt. Smith*, 14 *Common Bench Report*, page 196, vol. 108; *English Common Law Reports*, page 596; *Addison on Torts*, vol. 2, *Wood's ed. of 1876*, p. 156; *Cooper v. Harding*, *Queen's Bench Reports*, vol. 7, p. 928). A person causing process to be issued is not responsible for anything that is

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due under it where the process is afterwards set aside, not for irregularity but for error. In the one case a man acts irregularly and improperly, without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But where he relies upon the judgment of a competent court he is protected (*Addison on Torts*, vol. 2 [Wood's ed. of 1876], page 41, and cases cited). A judgment protects the party for acts done under it, although subsequently reversed for error. It is otherwise if the judgment is set aside for irregularity. Where a judgment is irregular the party is chargeable with the irregularity, but the court only is responsible for error (*Simpson agt. Hornbeck*, 3 *Lans.*, 53).

Messrs. Wehle & Jordan and *Charles Wehle*, for plaintiff.

C. Bainbridge Smith, of counsel for plaintiff, in opposition to the motion to dismiss cited *Cooper agt. Harding* (*supra*), and *Addison on Torts* (vol. 2, *Wood's ed. of 1876*, p. 41), and contended that the acts of defendants in procuring the arrest of the plaintiff were irregular and malicious, and the order of the special term unconstitutional and void.

LAWRENCE, *J.*—The examination which I have been enabled to give to this case since recess has only served to strengthen the opinion which I intimated to counsel before the court rose. It is conceded on all hands, that the court of common pleas had jurisdiction in the case of *Fisher agt. Raab et al.*, in which the original order, which has been the cause of this controversy between these parties was made. The order was made by that court, a court of competent jurisdiction, after this plaintiff and his opponents had been heard and after full consideration of the subject. It is true that upon appeal the court of appeals has reversed the order of the special term and also the order of the general term of the common pleas affirming the order of the special term, and has declared that that order was erroneous. But they have

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nowhere declared that the court of common pleas did not have jurisdiction of the action of *Fisher agt. Raab et al.*, and therefore, to my mind, the case presents the feature of a case in which both the special and general terms have decided one way and the court of appeals after consideration have decided another, and I think it would be a very dangerous rule for any court to lay down that a counsel or an attorney who has been sustained by the courts below in the proceeding which he had adopted, a proceeding taken after full consideration, after all the parties had been heard and all their rights considered, should be liable in an action at the hands of the party against whom the proceedings were taken. The cases which have been cited from the English courts are extremely strong. On this point I cannot distinguish the case of *Williams agt. Smith* and cases cited (14 *Common Bench Reports* [N. S.], p. 196; vol. 108 of the *English Common Law Reports*, p. 596) in any particular from this case. The head-note by the reporter is as follows:

“Upon a change in solicitors in certain suits in equity an order was made by the master of the rolls requiring the former solicitor to hand over to the newly-appointed solicitor all papers and documents in his possession, custody or power relating to the suits. Some of the papers were in the hands of counsel and others in the hands of a law stationer who respectively claimed liens thereon for fees and charges, and the solicitor alleging that his client had undertaken to provide funds for fees and disbursements, but had failed to do so was consequently unable to comply with the order as to those papers. The newly-appointed solicitor upon an affidavit alleging the neglect to obey the order, but not mentioning the excuse set up, obtained from the clerk of the records and writs a writ of attachment under which the former solicitor (already in custody for debt) was detained. An application having been fruitlessly made to the master of the rolls to set aside the judgment upon a statement of all the facts the former solicitor appealed to the lords justices, who reversed •

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the decision of the master of the rolls, with costs, and ordered the writ to be set aside and the solicitor discharged from custody. It was held that neither the solicitor who so sued out the attachment nor the client was liable in trespass." I cannot distinguish the case at bar from that case in any particular.

Now, as regards the regularity which was spoken of by Mr. Smith, I think that was a matter entirely within the power of the court to answer; and as to the detention of the plaintiff by the sheriff after he had made payment, that seems to me to be an act of the sheriff. The sheriff was not obliged to take Mr. Langbein's opinion, nor was Mr. Langbein bound to give any opinion. There was the order of the court, the commitment and the act of the sheriff. It is one of the risks and hazards of the sheriff's office to determine at his peril whether he can or cannot further detain a party in his custody under a certain writ or process. I wish also to say, in dismissing the complaint, I rely not only upon the case to which I have referred at length from the English reports, but also to another English case, the case of *Cooper agt. Harding* (which is reported in 7 *Adol. & Ell. [N. S.]*, p. 928 and following pages; and also *Simpson agt. Hornbeck*, 3 *Lans.*, 54), referred to by the counsel for the defendants.

I desire also to state generally, as I have endeavored to state before, that if any wrong was done to the plaintiff in this case, it seems to me to have proceeded from the error of a judicial tribunal for which an attorney and counselor could not and ought not to be held liable.

I ought also to state that it appears from the testimony in the case that not only was the cause of the Messrs. Langbein predicated upon the action of the court of common pleas, but it was certainly sustained by the judicial determination of two justices of the supreme court, presiding justice DAVIS and justice BRADY.

For these reasons I dismiss the complaint.

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SUPREME COURT.

EDWARD T. MAGAURAN agt. CHARLES L. TIFFANY and another.

Trust with respect to stock in a corporation — accountiny by trustee — pleading.

Where the plaintiff's complaint alleged that the defendants jointly agreed that each should hold in trust for plaintiff twenty shares of stock of a corporation, until the dividends which might be realized on the forty shares should amount to the price of the shares of the stock, and that one of the defendants sold the twenty shares held by him, in trust, to his codefendant:

Held (overruling demurrer to the complaint), that though not enough is shown to call upon defendant for a specific account, the action is proper to the extent of obtaining a judicial determination as to the existence of a trust with respect to the twenty shares which one defendant sold to the other, as with knowledge of the trust such defendant could not purchase to his own use these shares.

In the construction of pleadings regard must be had to the facts stated, and a pleading cannot be sustained upon implications, unless they necessarily follow from what has been alleged.

Special Term, November, 1881.

DEMURRER to complaint.

Charles Miller, for demurrer.*Richard O'Gorman*, opposed.

VAN VORST, *J.* — I do not think that the demurrer of the defendant Tiffany is well taken. The plaintiff may not be entitled to all the relief he asks, but the prayer to the complaint is not a subject of demurrer. The question arises, under the issue of law — which concedes for the present purpose all the allegations of fact which the complaint alleges — is the plaintiff entitled to any relief?

The agreement with respect to the forty shares of stock is alleged to have been made with both defendants. They jointly agreed that each defendant should hold in trust for

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the plaintiff twenty shares of stock until the dividends which might, from time to time, be realized or accrue on the forty shares, should amount to the price of the shares of stock.

That agreement has been violated by the defendant Reed, who has sold the twenty shares held by him in trust to his codefendant. With knowledge of the trust the defendant Tiffany could not purchase to his own use those shares. But the trust would attach to them in his hands. To the extent of obtaining a judicial determination as to the existence of a trust with respect to those twenty shares, the action is proper, and that disposes of the question raised by the demurrer adversely to the plaintiff.

Had the question turned exclusively upon the defendants' liability at this moment to render an account of dividends and profits, I should hesitate to say that enough was alleged to call for a specific account.

Undoubtedly persons standing in a trust relation, as these defendants do, can appropriately be asked for an account of dividends and profits which have accrued, the knowledge of which is presumably in their possession and not in the plaintiff's. But trustees are not to be vexed with unreasonable or unnecessary calls in this direction. It does not distinctly appear that they have never given or rendered statements of these dividends and profits. It is true that they have refused this last demand, but to justify the court in concluding that the refusal was unwarranted it should plainly appear that no account within a reasonable time had been previously rendered. It may be urged that there is an implication that no account or statement had been rendered before the last demand. No such implication necessarily arises from the allegations of the complaint.

In the construction of pleadings regard must be had to the facts stated, and a pleading cannot be sustained upon implications unless they of necessity follow from what has been alleged.

In addition to this the plaintiff, in substance, avers knowledge

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of the amount of the dividends obtained through information which he believes to be true. He states in figures the amount, and it falls far short of the sum which would entitle him to the stock.

In view of this fact no practical use could be made of any further knowledge at this time as to the amount of the dividends under the conditions upon which the stock was to be held, and under which the plaintiff would be entitled to its actual possession.

For the reason first above assigned, however, there must be judgment for the plaintiff on the demurrer with liberty to the defendant to answer on payment of costs.

SUPREME COURT.

CHARLES W. ADAMS, appellant, agt. EDWARD ROBERTS,
respondent.

Reply — Effect of failure to reply where the same is necessary — Counter-claim — Code of Civil Procedure, sections 515, 516.

Though failure to reply, in a case where a reply is necessary under the Code, does not prevent the party from bringing his cause on for trial, yet a motion by plaintiff to place the cause on the special circuit calendar was properly denied, for the reason that plaintiff had not served a reply, because the counter-claim being admitted there was no issue, the only question being as to the amount of damages.

First Department, General Term, July, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying motion to place the cause on the special circuit calendar, for the reason that the plaintiff had not served a reply.

Culver & Betts, for appellant.

G. S. P. Stillman, for respondent.

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BRADY, *J.* — This action was brought to recover the value of services rendered and materials furnished in the printing of a case and points on appeal. The answer denies the agreement alleged in the complaint, and charges a breach of the agreement on the part of the plaintiff, and claims damages for such breach. No reply was served to the answer, and no order was made requiring the plaintiff so to do.

When the motion was made in the court below the defendant objected that the plaintiff's motion was made on four days' notice, instead of eight; that there was no final issue, and that the plaintiff was in default for want of a reply. The motion was denied, however, on the ground that the plaintiff had failed to serve a reply.

By section 515 of the Code of Civil Procedure it is provided that where the answer contains a counter-claim the plaintiff, if he does not demur, may reply to the counter-claim. The same section further provides that if the plaintiff fails to reply or demur to the counter-claim the defendant may apply upon notice for judgment, when a reference may be ordered or a writ of inquiry issued as may be determined by the court to which such application is made.

Section 516 contains nothing authorizing the court to require a reply to a counter-claim. Its provision is, that when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion on the defendant's application, direct the plaintiff to reply; and the proceedings, upon failure to reply, are subject to the same rules as in the case of a counter-claim; that is to say, if the court directs on application a reply to be made, and the reply be not made, then the case is subject to the same rules as are provided in the case of a counter-claim. That section does not apply here for the reason that no application was made for a reply, and for the further reason that if an application had been made under that section for a reply, inasmuch as a counter-claim is set up, its provisions could not be invoked.

The failure to reply, in a case where a reply is necessary

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under the Code of Civil Procedure, may not prevent the party from bringing his cause on for trial. He has a right no doubt to do so without a reply, and when it is reached upon the calendar the defendant can then assert any rights acquired by the omission of the plaintiff to serve a reply.

The plaintiff is not bound to wait until the defendant chooses to make a motion for judgment, as he may do under section 515 of the Code of Civil Procedure. If he prefers to bring his cause to trial he may do so and take the consequences of such a step. But the special calendar is designed for issues to be tried, and this case is not therefore within its purview. There is no issue because, as we have seen, the counter-claim is admitted, and the only question to be examined is one relating to the amount of damages.

For these reasons the order appealed from was correctly made and must be affirmed, with ten dollars costs and disbursements.

All concur.

SUPREME COURT.

MARGARET A. DICKINSON agt. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK.

Limitations, statute of — Action against city for damages for injuries sustained from falling upon crosswalk by reason of accumulation of ice and snow — What period of limitation applies — Code of Civil Procedure, sections 382, 383.

In a suit against the city for damages for injuries sustained from falling upon a crosswalk in which the complaint alleges that defendant, notwithstanding it was its duty to keep the streets in good order and repair and not to suffer the ice or snow to remain in such condition on the crosswalks as to make it unsafe and dangerous for foot passengers, had improperly, carelessly, negligently and unlawfully suffered ice and snow to remain upon the crosswalk where plaintiff fell, in such a condition as to render it dangerous for ordinary use:

Held (upon demurrer to answer setting up statute of limitations), that subdivision 5 of section 383 of the Code of Civil Procedure prescribing a

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limitation of three years for actions based upon negligence does not apply, and that defendant's alleged neglect in suffering ice and snow to remain on the crosswalk so as to be unsafe and dangerous to foot passengers was a wrongful act within the purview of section 382 prescribing six years as a limitation to actions arising for such cause.

Special Term, December, 1881.

Clifford A. H. Bartlett, for demurrant.

William C. Whitney and *D. J. Dean*, for respondent.

LARREMORE, *J.*—The complaint avers (*inter alia*) that it was the duty of the defendant to keep and maintain the streets and avenues of the city in good order and repair and not to suffer the ice or snow to be or remain in such a condition on the crosswalks thereof as to make it unsafe and dangerous for foot passengers; that, notwithstanding its said duty, the defendant at and for a long time prior to January 10, 1877, improperly, carelessly, negligently and unlawfully suffered ice and snow to be and remain upon the crosswalks on the east side of Eighth avenue at the intersection of Eighteenth street, in the city of New York, in such a condition as to render it dangerous for ordinary use; that on the day last named the plaintiff while lawfully passing over and upon such crosswalk, and without any fault on her part, was suddenly thrown down fracturing her thigh, in consequence of which injury and the pain and suffering incident thereto she has sustained damages in the sum of \$15,000; that on April 28, 1881, she presented the claim upon which this action is brought, in writing, to the comptroller of the city of New York and demanded payment thereof; that thirty days have elapsed and the same has not been paid.

The defendant answered denying the facts alleged for want of sufficient information and belief, and setting up as a defense contributory negligence and the statute of limitations; that more than three years have elapsed since the alleged cause of

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action arose. To which last mentioned defense the plaintiff demurs.

Counsel for the defendant insists that the ground of the action is negligence, and that subdivision 5 of section 383 of the Code of Civil Procedure applies. On the contrary, it is urged that the damages sought to be recovered are based upon the unlawful act of the defendant in allowing its public thoroughfares to become impassable and dangerous, and that the personal injury complained of is clearly within the meaning and contemplation of subdivision 3 of section 382, as explained and defined by subdivision 9 of section 3343 of the Code of Civil Procedure.

Section 382 embraces within its limitations what section 92 of the old Code did not, viz., an action for a personal injury, except in a case when a different period is expressly prescribed. Section 383 provides for a personal injury resulting from negligence. The inquiry therefore will be, under which section the present action belongs.

In *Irvine agt. Wood* (51 N. Y., 224) it was decided that an excavation in a street of a city for a coal hole not properly covered and protected was a nuisance, and a person injured thereby could recover for such injury irrespective of any question of negligence. To the same effect is the ruling in *Clifford agt. Dam* (81 N. Y., 52). The theory established is that an action may be predicated upon a wrongful act without proof of negligence.

If it was the duty of the defendant not to suffer ice or snow to be or remain on the premises in question so as to be unsafe and dangerous to foot passengers, then its alleged neglect in this respect was a wrongful act within the purview of section 382 prescribing six years as a limitation to actions arising for such cause.

The demurrer should be sustained.

Struve agt. Droge.

N. Y. COMMON PLEAS.

JOHN C. STRUVE agt. CARSTEN DROGE.

District court — Appeal from judgment to court of common pleas — No undertaking or deposit required unless stay of execution is desired — Code of Civil Procedure, sections 3047, 3050.

On an appeal from a district court judgment to the court of common pleas no undertaking or deposit is required to perfect the appeal. The payment of the costs of the action only is required by section 3047 of the Code of Civil Procedure.

By section 3050 no undertaking is required unless a stay of execution is desired.

Special Term, September, 1881.

MOTION to dismiss appeal for irregularity in failing to execute and file a proper undertaking on appeal as required by the Code of Civil Procedure, or making a deposit in lieu thereof.

G. S. Van Pelt, for motion, contended that the appeal should be dismissed on the ground that the appellant had failed to either file an undertaking or deposit the costs awarded in the judgment in the court below, as required by the Code of Civil Procedure or the rules and practice of the court.

George F. & J. C. Julius Langbein, in opposition, made and argued the following points:

First. By section 3050 of the Code of Civil Procedure, applicable to the district courts in the city of New York, no undertaking on appeal is required unless the appellant desires a stay of execution (*Langbein's Law and Practice*, p. 268). No stay of execution is desired, and the respondent is at liberty to issue execution if so advised.

Struve agt. Droge.

Second. There is no such permission or requirement of law as an undertaking to be filed, or that the appellant make a deposit in lieu thereof as desired by the respondent. By section 3047 the appellant at the time of serving the notice of appeal must pay to the justice, or if he be dead to the clerk, the costs of the action included in the judgment and the sum of two dollars as the fee of the justice for making the return. By section 3050 the justice must, after ten and within thirty days from the service of the notice of appeal and the payment of the costs and fees as prescribed in section 3047, make a return to the appellate court.

J. F. DALY, J.—The moving papers do not show that appellant has failed to pay to the justice or the clerk of this court the costs of the action as required by section 3047 of the Code. The affidavit merely states that “no undertaking on said appeal has ever been approved, filed or served, and that said appellant has not given the security on appeal by deposit or otherwise as required by the rules and practice of this court.” No undertaking or deposit is required to perfect an appeal. The section cited provides for the manner of perfecting the appeal so far as service on the justice is concerned, and that only requires the payment of the costs of the action. The motion is evidently not based on a failure to comply with that section.

Motion denied with five dollars costs, to abide event of appeal.

Devlin agt. The Mayor, &c., of New York.

N. Y. COMMON PLEAS.

CHARLES DEVLIN agt. THE MAYOR, &c., OF NEW YORK.

Referees—When three may be appointed.

It seems, that in a proper case the court has the power and will direct the same to be tried before three referees.

Special Term, November, 1880.

T. C. Cronin, for plaintiff.

Wm. O. Bartlett, for defendant.

VAN HOSEN, J. — I have had and still entertain some doubts as to whether it is practicable at the present time in the city of New York to carry on protracted trials before three referees. It certainly is not. If the referees are in extensive practice it would be practically impossible to get them together on fifty or perhaps 100 different occasions and then hold them long enough in session to make any substantial trial or progress with a cause. As this case involves large amounts of money and serious questions affecting the city I have determined to grant the application for the appointment of three referees, but I think it necessary to make some provision to guard against accident which I fear may occur. Let a clause be inserted in the order that if it be found impossible or very difficult to get the referees together, and if the trial be consequently delayed, either party may apply for the discharge of two of the referees and that the trial proceed before the remaining referee; and that if either of the referees should die, or from any cause be unable or unwilling to act, the trial shall then proceed before a single referee, and the referee who has become supernumerary shall be discharged.

I shall make the conditions as favorable as possible for a safe and speedy trial by naming three gentlemen of experience as referees who will, I believe, so arrange their affairs as to bring the long pending litigation to an early close.

Bishop agt. Van Vechten.

ONEIDA COUNTY COURT.

GERTRUDE E. BISHOP, appellant, agt. ABRAM D. VAN
VECHTEN, respondent.

Appeal from justice's judgment — When and how taken — Notice of appeal from justices' court to county court — How to be signed — Code of Civil Procedure, sections 2886, 2890, 3046.

Where a notice of appeal from the judgment of a justices' court was dated June 17, 1881, was signed "C. E. Howe, appellant's attorney," and was served with an undertaking in due form to stay execution, signed and acknowledged by the appellant in person:

Held, that was sufficient.

The notice of appeal is a mandate of the county court, is properly entitled therein, and governed by the same general principles as other proceedings in a court of record. A party may sign it as attorney in person, adding office address or place of business, residence or other place where papers may be served upon him as required by Rule 2, general rules of practice, or by an *attorney-at-law*, and cannot be signed by an *attorney in fact* or an agent as such.

December, 1881.

C. E. Howe, for appellant.

Pomeroy, Townsend & Quinn, for respondent.

SUTTON, *County Judge*. — This is a motion to dismiss an appeal to this court for a new trial upon the ground that the notice of appeal is not properly signed.

The notice of appeal is dated June 17, 1881, is signed "C. E. Howe, appellant's attorney," and was served with an undertaking in due form to stay execution, signed and acknowledged by the appellant in person.

The argument in favor of the motion is that in justices' courts attorneys-at-law are not recognized as such, and an appearance before the justice must be by the party in person, or by an agent, or attorney in fact duly authorized and whose authority must be proven. That the notice of appeal is the

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process of and an appearance in the justices' court. Consequently a notice of appeal signed as this, "C. E. Howe, appellant's attorney," in the absence of proof in the return of his authority so to sign, is a nullity. If the premises are sound the conclusion is correct.

The provisions of the Revised Statutes regulating appearances in justices' courts, are embodied in sections 2886 and 2890 of the Code of Civil Procedure, and the construction of these sections claimed by respondent is fully established by the commission of appeals (*Sperry* agt. *Reynolds*, 65 *N. Y.*, 179).

There are good reasons of public policy why this construction should be strictly adhered to. Parties in person, or by agents or attorneys in fact, not regular practitioners, frequently conduct proceedings in justices' courts, and are authorized by law to so do. Such agents or attorneys are not officers of those courts; are not under their control save in their presence.

The justices' court cannot summarily punish them as for contempt for proceedings taken by them without authority of their principals. It cannot grant new trials to correct errors, vacate its own judgments, or in any other manner *after judgment* grant relief to a party injured by its proceedings.

But is the notice of appeal the process of, or an appearance in the justices' court?

The true theory of an appeal in general is that the appellate court, upon the application of a party feeling aggrieved, issues its process commanding the court below to send up the record of the case that its judgment or decision may be reviewed.

Why should the court below issue such a process? It decided the case according to its conception of law and justice. It in effect says to the applicant for relief from its judgment or decision, you have suffered no injury. The application is made to the appellate tribunal; its answer in a proper case is, we will examine into the matter. Thereupon it issues its mandate to the court below to send up the case for review.

All this under the present practice is done by serving a

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notice of appeal. This notice is the application to, and the mandate of, the appellate court combined (*Whitley agt. Leeds*, 27 *How. Pr.*, 378; *Wait's Law and Pr.* [vol. 2], p. 772).

All proceedings for the review of a judgment or decision of a court of record subsequent to the notice of appeal, are properly entitled in the appellate court. Why not so entitle the notice of appeal? There is nothing in the Code of Civil Procedure which makes any distinction in this regard, between appeals from judgments of justices' courts and appeals from judgments of courts of record. Section 3046 provides: "An appeal is taken * * * by serving a written notice of appeal." * * *

There is no declaration that it is an appearance in or the process of the justices' court. No requirement that it be signed by the appellant personally, or by his agent or attorney in fact. No intimation that attorneys-at-law are not recognized as such in all proceedings on appeal, and there is no reason of public policy why they should not be, but on the contrary there are the same reasons why they should be so recognized that are deemed all sufficient in other courts.

There is a marked difference between the phraseology of section 3046, Code of Civil Procedure, and section 353, Code of Procedure. The latter section reads: "The appellant shall within twenty days serve a notice of appeal," &c. The former: "An appeal is taken by serving," &c. This change of language is ample ground upon which to base an opinion that the legislature intended thereby to abolish the distinction between the practice on appeals from justices' courts and courts of record, and make the entire system more uniform and harmonious.

There are many reasons why the notice of appeal should be regarded as the process of the county court, and from which it may be argued that the legislature so intended.

A justice of the peace has no power or jurisdiction over a case tried by him after judgment, except to make a return, give a transcript and issue an execution.

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If the notice of appeal is the process of the justices' court, why has he not the power to control, amend, dismiss or disobey it? If it is not the process of the county court why has the county court power to enforce from the justice a return in obedience to the notice?

If the notice of appeal is the process of the justices' court, appellant's signature or that of his agent or attorney in fact, need not be accompanied by any designation of residence, office address, or place where papers may be served, and endless confusion and inconvenience may result.

To hold the notice of appeal the process of the county court makes the practice simple, harmonious, uniform. To hold it the process of the justices' court creates a legal monstrosity, and fills the practice with complications, technicalities and difficulties.

We conclude that the notice of appeal is a mandate of the county court, is properly entitled therein, and governed by the same general principles as other proceedings in a court of record. A party may sign it as attorney in person, adding office address or place of business, residence or other place where papers may be served upon him as required by Rule 2, general rules of practice, or by an *attorney-at-law*, and cannot be signed by an *attorney in fact* or an agent as such.

These views somewhat conflict with *Andrews* agt. *Long* (19 *Hun*, 303); *Hall* agt. *Sawyer* (47 *Barb.*, 116); *Burrows* agt. *Norton* (2 *Hun*, 550). These cases, however, were decided under the Code of Procedure.

The motion is denied.

Gardner agt. Gardner.

COURT OF APPEALS.

PATIENCE M. GARDNER, respondent, agt. JAMES GARDNER,
appellant.

Contempt proceedings — Injunction — When merged in the final judgment.

In an action for a limited divorce an injunction was granted restraining defendant from interfering with plaintiff's possession and occupancy of a certain house. A final judgment was afterwards entered granting a divorce and alimony which contained no reference to the injunction and granted no other:

Held, that as the judgment covered the whole case it superseded the injunction; that it was the further order of the court, and an appeal taken therefrom would not affect it so as to restore or reinstate the injunction.

Decided November, 1881.

By an order of special term defendant was adjudged guilty of contempt for the violation of an order dated October 7, 1878, enjoining him from interfering with plaintiff in her possession and occupancy of a house, &c.

It appeared that plaintiff brought an action against defendant for a limited divorce; that said order was granted therein; that on October 7, 1880, a final judgment was entered in said action in favor of plaintiff granting a divorce and alimony but no mention was made in the judgment of said injunction; and it contained no continuance thereof by express reference thereto, and no other or further injunction was granted thereby. An appeal was duly taken from said judgment by the defendant, and an undertaking to stay the execution thereof approved by the court was duly filed.

William G. McCrea, for appellant.

Clark F. Whitmore, for respondent.

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PER CURIAM. — The question presented upon this appeal is whether the injunction order granted prior to the judgment was in force at the time the alleged contempt was committed. By the terms of the order it was to continue in force until the further order of the court. No provision is made in the final judgment or order entered upon the referee's report allowing alimony, continuing the injunction. Nor was any reference made in said judgment to the injunction; nor was any further or other injunction granted thereby. The claim of the appellant rests upon the theory that the injunction being unconditional and to continue in force only until a further order is made, no such order having been granted, it was abrogated by the final judgment. It is, no doubt, the general rule that the judgment should control; but the question to be determined upon this appeal is whether this principle applies when the defendant has appealed from the judgment and refused to abide by its requirements. It is well settled that a judgment, until reversed, is conclusive between the parties to the record upon all matters directly adjudicated. So long as it is in force it must be deemed to have determined their respective rights, and the courts are bound to give effect to its determination (*Fellows* agt. *Herman*, 13 *Abb.* [*N. S.*], 1, 10). In the case at bar the judgment settled the rights of the parties and made provision for the payment of alimony amicably. It thus adjudicated upon the subject of the controversy without containing any provision by which the right to the possession and occupancy of the premises was given to plaintiff. This certainly disposed of the injunction and provided for an allowance in its place for the plaintiff's maintenance and support. If the judgment covered the whole case, as is quite manifest, then it superseded the order of injunction and was a substitute for the same, and the order became merged therein. If the judgment was upheld plaintiff would be deprived of no rights, as security was given upon the appeal. That it might be reversed does not add to the plaintiff's right to uphold the injunction if it was abro-

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gated thereby. There can be no question that the injunction was abrogated by the judgment, if no appeal had been taken, and the bringing up of such appeal cannot change its legal effect upon any sound principle. The judgment might, perhaps, have provided for the plaintiff's occupation of the premises if the court had so determined, and as it did not so adjudge it must stand, subject to the application of legal rules as to its effect upon the rights of the parties. In the *People* agt. *Randall* (73 N. Y., 416), it was held that when in proceedings supplementary to execution an order was issued restraining a third person from disposing of property in his possession belonging to the judgment debtor "until further order in the premises," an order appointing a receiver is such further order and the final order, and any restraint thereafter desired should be inserted in that order. This decision is directly in point, as the case involved the effect on the order. Some cases are cited by the respondent's counsel as upholding a different doctrine, but upon an examination of them, we are satisfied that they are not in conflict with the rule laid down, and they relate to actions where the injunction was the principal subject in controversy, and where it would be eminently proper for the court, pending an appeal, to interpose its power to command respect to its judgments and obedience to its authority (*Sixth Avenue Railroad Co.* agt. *Gilbert E. Railroad Co.*, 71 N. Y., 430; *Erie Railway Co.* agt. *Ramsey*, 45 *id.*, 637; *Powers* agt. *Village of Athens*, 19 *Hun*, 169).

It follows from the discussion had that the final judgment was the further order of the court, and the appeal taken, therefore, did not affect the same so as to restore or reinstate the injunction.

The order appealed from should be reversed, and the motion on which the same is founded be denied, with costs.

All concur, except MILLER, J., not voting.

Coburn agt. Anderson.

SUPREME COURT.

MARTHA A. COBURN agt. E. ELLERY ANDERSON and another.

Deed absolute when not a mortgage — Conditional sale.

The plaintiff, who was building seven houses in Fortieth street on which defendant B. had loaned money upon mortgages, conveyed, in February, 1874, two of the houses to A., for a consideration of \$10,000, subject to three mortgages aggregating \$59,000. A. soon after took possession and completed the two houses at his own charge, and then one of the houses was sold under foreclosure of one mortgage, and B., in the end, acquired title thereto. Afterward A. sold the other house to B., who is now the owner of the entire property. The plaintiff, who had not previously claimed the property, brought this action in 1880 to have the deed of 1874 declared to be a mortgage security, asserting, though there was no contemporaneous writing to that effect, that it was given as collateral for the loan, the houses to be sold when finished, and the \$10,000 repaid with interest. This defendant A. denied, and testified that the conveyance was absolute, with the conditional right in plaintiff to effect a sale of the houses which would completely reimburse him (A.) at any time within eight months:

Held, that the deed was not intended as a mortgage, but as representing an actual sale, and the privilege extended to plaintiff to find a purchaser for the property never having been complied with, she lost all right or interest in the property.

Special Term, July, 1881.

TRIAL of issues of fact.

Joseph Fettretcht, for plaintiff.*J. A. Bush* and *F. Hillan*, for defendants.

VAN VORST, *J.* — In order to justify a decree adjudging a deed absolute upon its face to be in fact a mortgage, or intended by the parties to be such, the proof should be reasonably clear and satisfactory. The deed, in the absence of any contemporaneous writing giving it a different character, is presumed to be such as upon its face it appears. And when

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extensive parol evidence is relied upon to show that it was intended only as collateral security for a debt, the evidence should be explicit. It would not answer to rest a judgment, making a change so radical, upon doubtful evidence. The plaintiff in this case, who is the wife of Edward H. Coburn, in the month of February, 1874, by deed containing covenants of warranty, conveyed to the defendant Anderson, for the consideration of \$10,000, two lots of ground in the city of New York with the buildings thereon. Her husband joined in the conveyance. The conveyance was made subject to certain covenants and conditions contained in a previous deed to the plaintiff's grantor, and also subject to three mortgages upon the premises, amounting to \$59,500. The consideration of \$10,000 was paid in money, in the manner directed by the plaintiff's husband, who represented her, and had the entire charge of the matter in so far as she was concerned.

The houses upon the lots were not fully completed when the conveyance was made and delivered, and the grantee, Anderson, shortly after the execution of the deed, and in the month of March, 1874, took possession of the property, and completed the houses at his own charge. As to one house and lot the same was afterwards sold under a decree in an action of foreclosure, instituted upon one of the mortgages, and the defendant Charles Banks in the end acquired title thereto. The other house and lot, the defendant Anderson afterwards, for a valuable consideration, conveyed to the defendant Banks, who is now the owner of the entire property. This action was commenced in the year 1880, and as its main object seeks a judgment declaring the deed of February, 1874, executed by the plaintiff to the defendant Anderson to be a mortgage security, and that the defendants, Anderson and Banks, be declared to be mortgagees only, and they shall account for the rents and income received, and that if it shall appear that the debt intended to be secured has been paid, that they be adjudged to reconvey the property to the plaintiff.

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No contemporaneous writing is produced to change the deed from what it purports to be, and the plaintiff's case rests upon the testimony of her husband. The substance of his evidence, in so far as it relates to this subject, may be shortly stated as follows: He was engaged in building seven houses on Fortieth street, including the two in question. The defendant Banks had loaned him money for this purpose, and had taken security by way of mortgages on all the houses and lots. Anderson was the attorney of Banks.

Coburn testifies that on an occasion in February, 1874, Anderson asked him if he had money enough to finish the houses, and that he replied that he would require a little, about \$10,000; that Anderson asked him how he would secure him if he would loan him the \$10,000; that his reply was that he would give a mortgage, as collateral security, on the two easterly houses, to which Anderson assented. That the parties afterwards met at the office of Banks, and that Banks proposed that a deed should be given as collateral instead of a mortgage, to which he assented, and that the deed was accordingly given. Coburn testified that no time was mentioned when the money should be paid back; but that when the houses should be sold, after they were finished, Anderson was to receive back, from the proceeds of sale, his \$10,000 and interest, and that if there was any surplus it was to go to him (Coburn). That he never promised to repay the \$10,000, and that he was not to pay if the houses did not realize enough to pay the sum advanced with interest, and the previous incumbrances. Coburn testified that he only was entitled to sell the houses; that Anderson was to hold on until a purchaser could be found to pay a consideration sufficient to satisfy all the incumbrances, including the advance of \$10,000, leaving a surplus, and that no time was mentioned within which the houses should be sold. The defendant Anderson denies the statements of Coburn in every essential particular. He denies that he loaned, or agreed to loan, Coburn any money to complete the houses; but testifies that he agreed to take the two

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houses in question subject to the incumbrances upon them for the consideration of \$10,000; that it was, however, understood that if the property could be sold — and for that purpose Coburn was at liberty to find a purchaser — for a sum sufficient to pay all the incumbrances and reimburse Anderson his \$10,000, with interest, that he (Anderson) would convey to such purchaser, and the surplus, if any, should be paid to Coburn.

Anderson understood that the conveyance to him was absolute; that he intended and took it as such, with the conditional right in Coburn to effect a sale which would completely reimburse him at any time before the first day of November following, and he denies that the arrangement between him and Coburn was otherwise.

Mr. Banks was examined as a witness, but his testimony gives no support to the plaintiff's claim, but it rather sustains that of the defendant Anderson, in so far as he had any knowledge or recollection of the transaction.

The testimony of the witness Steinmetz is too indefinite to justify the court in saying that it supports the plaintiff's narration of the transaction. The testimony does not warrant the conclusion that the sum of \$10,000 in the then condition of the buildings, and the amount of the existing incumbrances thereon, was so inadequate as to suggest any criticism or scrutiny.

Under the evidence there was no large margin of profit. No purchaser for the premises was found before the first day of November following, willing to give the amount, and the title subsequently passed from Anderson to Banks as above mentioned.

In the dealings between Anderson and Banks I discover no evidence of want of good faith or of entire honesty — nothing prejudicial to the plaintiff or the rights of her husband. From the consummation of the transaction in 1874 down to the year 1880, when this suit was commenced, no claim was made by the plaintiff that the deed was otherwise than an absolute conveyance, nor was any application for a reconveyance made.

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Upon the whole case, and after careful consideration of the evidence, the conclusion reached is that the deed was not intended as a mortgage, but as representing an actual sale, with a privilege only in Coburn to find a purchaser for the property before the first day of November following, who would take the same for a consideration sufficient to pay all the incumbrances existing thereon, together with the consideration of \$10,000 and interest, paid by the defendant Anderson, in which event Anderson was to convey to such purchaser, and that any surplus arising was to be paid to Coburn.

The privilege extended to Coburn was never complied with, and the plaintiff has lost all right to or interest in the property.

It appears to me that this conclusion, upon the facts above stated, is upon principle reasonable and just. But that the plaintiff is not entitled to any equitable relief, upon a state of facts above indicated, is clearly enough shown by authority (*McCauley* agt. *Porter*, 71 *N. Y.*, 173; *Baker* agt. *Thrasher*, 4 *Denio*, 493; *Glover* agt. *Payn*, 19 *Wend.*, 518; *Horn* agt. *Keteltas*, 46 *N. Y.*, 605).

The plaintiff's complaint is dismissed upon the merits, with costs.

N. Y. COMMON PLEAS.

ANSONIA BRASS COMPANY agt. WILLIAM C. CONNER,
Sheriff, etc.

Sheriff—*Liability of, for not returning execution*—*Sheriff's return not conclusive as to amount collected*—*Appeal*—*When and how interlocutory judgment reviewable*—*Failure of proof as to plaintiff being a corporation*—*Time to make objections as to.*

Where, in an action against the sheriff for damages for neglecting to return an execution within sixty days, the court, upon the trial, gave an interlocutory judgment in favor of the plaintiff on the pleadings, and sent the cause to another branch of the court that the plaintiff's damages might be assessed:

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Held (reversing judgment for plaintiff), 1. That the interlocutory judgment is reviewable upon this appeal, notwithstanding the defendant, in his notice of appeal, did not mention the interlocutory order, because the Code which was then in force did not require any such specification to review interlocutory judgments or intermediate orders.

2. As the complaint, which alleged that the plaintiff "is a corporation duly created and existing, doing business in the city of New York," did not aver that the plaintiff was a corporation created under a statute of New York, and the answer put in issue the existence of the corporation, proof should have been given of the corporate character of the plaintiff.

3. The allegation of the complaint that the plaintiff had recovered a judgment against one Wilson being denied by the answer, and the fact being essential to the existence of the cause of action, the court erred in directing judgment on the pleadings.

DALY, C. J. (dissenting), holds: 1. That as it appeared the sheriff on receiving the execution levied on the property of defendant, and all proceedings were stayed five days thereafter, and that after the stay was removed he had a month and twelve days before the sixty days expired, that was ample time within which to sell the personal property levied upon and make his return; and for failure to do so he was liable to plaintiff.

2. The sheriff's return is not conclusive as to the amount collected.

3. The time to make objection as to failure of proof that plaintiff was a corporation and that the execution was founded upon a valid judgment, was when the motion was made for judgment upon the pleadings.

General Term, May, 1881.

Before DALY, Ch. J., VAN HOESEN and J. F. DALY, JJ.

VAN HOESEN, J. — The complaint alleges that the plaintiff is a "corporation duly created and existing, doing business in the city of New York." The answer denies any knowledge or information sufficient to form a belief as to the truth of that allegation. Whether or not the plaintiff was bound to offer any proof as to its corporate character depends upon the question as to whether it was a domestic corporation created under a statute of this state. If the plaintiff be a corporation created under a statute of this state it was unnecessary, under the pleadings as they stood, to introduce any evidence of its charter; but if the plaintiff is a corporation created by the law of any other state or country, it was bound to prove that

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it was a corporate body, clothed with the right to sue. It will be seen that the complaint does not allege that the plaintiff was created a corporation under any statute of the state of New York, and the omission to make that allegation may have arisen from the fact that the plaintiff owes its existence to the laws of Connecticut. Where the complaint does not aver that the plaintiff is a corporation created under a statute of New York (there being no presumption that it was so created), the court must apply the old rule of the common law which required proof of the corporate character of the plaintiff when the plea put the existence of the corporation in issue. *Corporatio vel non* was, therefore, one of the issues to be tried in this case.

Again, the defendant alleged that the plaintiff had recovered a judgment against one Wilson. This the answer denied. Was the fact that a judgment against Wilson had been recovered by the plaintiff a fact essential to the existence of the cause of action? If it were, it certainly was error to direct that the plaintiff should have judgment on the pleadings in this action without proof that a judgment against Wilson had ever been rendered. This action was for the failure to return an execution within sixty days.

The foundation of the sheriff's liability to the plaintiff is that he has neglected a duty which he owed to the plaintiff. There is no duty due from the sheriff to the plaintiff unless the latter had a judgment which he had an interest in having executed. Thus one of the elements of his cause of action is the possession of a judgment which he was entitled to collect by execution (*Addison on Torts*, p. 811). Just as in an action for not serving *mesne* process, or in an action for an escape, or in an action for a false return, the plaintiff must prove that he had a good cause of action which entitled him to call on the sheriff to execute the process; so in an action for failing to return an execution he must show that he was a creditor, and that he had a right, as such, to place the writ in the sheriff's hands and require it to be served and returned in

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accordance with the practice of the court. *Forsyth* agt. *Campbell* (15 *Hun*, 236) is an authority, if authority were needed, directly in point.

It appears from the case that when this action came on for trial the plaintiff moved for judgment on the pleadings, and notwithstanding the defendant's opposition, the court ordered judgment in favor of the plaintiff, and sent the cause to another branch of the court that the plaintiff's damages might be assessed. After the assessment of damages judgment was entered up from which an appeal was taken to the general term of the marine court, which affirmed the proceedings at the trial term.

It is insisted that even if the plaintiff had no right to a judgment on the pleadings, the defendant cannot now complain because he did not mention in his notice of appeal the order of Justice GOEPP, which gave the plaintiff judgment. The answer is that the Code, which was in force when the action was tried and the appeal taken, did not require the appellant to specify in his notice every order of which he complained. It was enough that the order involved the merits and necessarily affected the judgment, as the order of Judge GOEPP unquestionably did.

It is evident that there has been no trial at all of some of the material issues raised by the pleadings. Those issues must be tried, and decided in the plaintiff's favor before a recovery can be had.

The judgment should, therefore, be reversed and a new trial ordered, with costs to abide the event.

J. F. DALY, J., concurs.

DALY, C. J. (dissenting). — The interlocutory judgment is reviewable upon this appeal. The provision in the new Code (*sec.* 1301) that if the appellant upon an appeal from a final judgment, intends to bring up for review thereupon an interlocutory judgment or intermediate order, he must in his notice of appeal specify the interlocutory judgment or order to be

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reviewed, does not apply to this case. The portion of the new Code of which this provision is a part, did not go into effect until the 1st of September, 1880; and the appeal to this court was brought before that, on the 19th of May, 1880, and is consequently governed by the old Code, which did not require any such specification in the notice of appeal to review interlocutory judgments or intermediate orders.

The sheriff is required by statute to return the execution within sixty days after he receives it. The execution in this case was received by the sheriff on the 22d of November, 1875, who levied upon personal property of the defendant, in the execution, and after said levy on the 27th of November, 1875, an order of the district court of the United States was served upon the sheriff, staying all proceedings under the execution, which order was vacated, as respects the sheriff, on the 14th of December, 1875, leaving him a month and twelve days thereafter within which to sell the property levied upon and return the execution. He suffered this time to go by, however, without making any return, and more than sixty days having elapsed since the receipt of the execution by him, the plaintiff, on the 27th of January, 1876, brought the present action against him for neglecting to return the execution.

The sheriff claims that the effect of the order of the United States court staying all proceedings under the execution, was to enlarge his time for making the return; that is, that the seventeen days during which the injunction was in force, must be added to the sixty days within which he is required to return the process, giving him until the seventh of February to make the return, and that consequently the plaintiff's action was prematurely brought on the 27th of January, 1876. No authority has been cited for this construction, and, in my opinion, it does not necessarily follow that this must be the effect of an order staying the sheriff's proceedings upon an execution. The effect of a stay of proceedings of this nature is to stay the sheriff from any further proceedings until the stay is removed; but he may perfect his levy, if he has made

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one, and hold the property levied upon, and the defendant, if he has been taken into execution (*Glover* agt. *Wittenhall*, 6 *Hill*, 597; *Crocker on Sheriffs*, secs. 35, 426); and if the sheriff is still under the stay after the sixty days have expired, it is an answer to any action against him for not making the return (*Paige* agt. *Willett*, 38 *N. Y.*, 35; *People* agt. *Carnley*, 3 *Abb.*, 215).

The sixty days allowed for the return of an execution is for the sheriff's benefit, that he may not be subject to an action or any compulsory proceedings until he has had a reasonable time to execute the process (*Renaud* agt. *O'Brien*, 35 *N. Y.*, 99). If the stay of proceedings extend over and beyond the sixty days, the sheriff having been prevented during the stay from doing anything further in the execution of the process, must necessarily have a reasonable time, after the stay is removed, to enable him to do so, which is to be determined by the circumstances of the particular case; or if the stay is vacated before the expiration of the sixty days, and he has been stayed during a considerable portion of that period, a reasonable length of time must also be allowed him, though it may overrun the sixty days. This, in my opinion, is a safer construction than to hold that the statutory time is necessarily extended for the full length of the time that a stay of proceedings may be enforced. Where the time within which an act is to be done is under the regulation of the court, the courts have held that the effect of a stay granted by it was to enlarge the time to the extent of the stay. Thus it was held that a stay amounted to an enlargement of the old four days' rule *nisi* (*Bayard* agt. *Malcolm*, 1 *Johns.*, 300), and the defendant had the same time to plead after the service of a bill of particulars that he had when the alternative order for the bill was served (*Mulholland* agt. *Van Fine*, 8 *Cow.*, 182), the regulation of the practice in this respect being left entirely to the court. But when the time within which an act is to be done is fixed by statute the courts have not assumed any right to enlarge it except where it was abso-

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lutely necessary to prevent a failure of justice, and only then to the extent that it was necessary, the time fixed by statute being rigidly enforced in cases where it would not be under the practice of the court (*People agt. Luth*, 1 *Wend.*, 42; *Ex parte Dodge*, 7 *Cow.*, 147; *White agt. Smith*, 16 *Abb.*, 109; *Bont agt. Griffin*, 5 *Wend.*, 84; *Cock agt. Bonn*, 6 *Johns.*, 526; *Graham's Prac.*, 71; 32 *id.*, —; *Todd's Prac. [9th Laws]*, 475, 577).

The stay in this case was only during about one-fourth of the time that the sheriff has by statute for making his return. He had already levied upon the property of the defendant in the execution when the order staying his proceedings was served; and after it was removed, a month and twelve days before the sixty expired, which was ample time within which to sell the personal property that he had levied upon and made the return, he was, in my opinion, bound to make it within that time; and not having done so was liable to the action brought by the plaintiff.

It appearing by the pleadings that the plaintiff had a cause of action, nothing remained but to assess them. It may be, as the appellant claims, that the proper course of procedure was for judge GOEPP, after he rendered the interlocutory judgment, to go on and assess the damages (*Chambers agt. Dempsey*, 15 *Abb. Pr.*, 1; *Belmont agt. Pontvert*, 3 *Rob.*, 693). But I do not propose to inquire whether it was or was not irregular for the damages to be assessed by another judge as the order was made upon a written consent, signed by the respective attorneys of the plaintiff and the defendant, that the damages might be assessed by the judge holding the trial term of the court on the seventeenth day of April. All that appears on the return is that the damages under the order were assessed by judge McADAM, and we must assume, nothing appearing to the contrary, that he was the judge intended by the order and the consent upon which it was founded. The reassessment before judge SHERIDAN, it appears by the return, was ordered by the general term, the previous assessment having

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been reversed by the general term upon appeal. The damages claimed in the action for the failure to return the execution within the sixty days was the amount of the judgment, but the defendant was properly allowed to show in mitigation of damages (*Wehle* agt. *Conner*, 69 *N. Y.*, 546) the return of the execution after the sixty days with an indorsement that the sheriff had made on it \$387.15, and that he had paid that amount to the plaintiff's attorney. The plaintiff then gave in evidence an account of the sale made by the defendant's auctioneer under the execution, by which it appeared that the gross amount of the sale was \$480.81. This evidence was objected to by the defendant, but the plaintiff was clearly entitled to show the amount which the defendant had actually received under the execution, which, after deducting the fees which the sheriff was lawfully entitled to, showed that the amount which the sheriff had received was greater than he had indorsed upon the execution and had paid to the plaintiff's attorney. The difference was eighty dollars and eighty-three cents, which judge SHERIDAN assessed as the damages to which the plaintiff was entitled. Judge SHERIDAN found, and I infer correctly, that the sheriff's fees upon the execution were twelve dollars and eighty-three cents; and if this difference of eighty dollars and eighty-three cents arose from any disbursements to which the sheriff had been put, in the case of the property and the sale of it, it was incumbent upon him to show it, to reduce the amount of damages.

It is claimed by the defendant that between the plaintiff and the sheriff the return is conclusive as to the amount collected upon it, except in an action brought for a false return. I am not aware of any case that has gone this length. The defendant cites *Sheldon* agt. *Paine* (7 *N. Y.* [3 *Seld.*], 457); but what was held in that case was that the return on the execution was conclusive as against the sheriff; that he could not gainsay it, and that the evidence given by him to impeach it should have been excluded.

Judge RUGGLES does in that case say, in general terms, that

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the return indorsed on the execution is conclusive between the plaintiff and the sheriff for the purpose of showing the amount of money raised by the officer on the writ.

The case in this state which he cites (*Townsend agt. Olin*, 5 *Wend.*, 207), however, was not an action to recover for a false return, but an action of assumpsit brought to recover the amount of certain notes received by the sheriff upon the execution, in which the sheriff offered to prove that the notes were not received by him in payment of the execution, or for the use of the plaintiff, but were taken for his own indemnity, which he was not allowed to do, as he returned on the execution that he had taken the notes pursuant to the plaintiff's direction. What was held in the case was that the sheriff could not be permitted to gainsay his return which, under his oath of office, was conclusive against him, but the court said that though the defendant was concluded by the return the plaintiff was not, and that he was entitled to show that what was contained in the return as to the direction given by him was not correct, which as an authority is directly the other way. What I understand to have been held in the cases is that an officer's return, being under his official oath, cannot be contradicted or impeached in the action in which it is made; that it is not traversable in the action as the court will not try upon affidavits whether it is true or false, but will leave the party to his action for a false return, and that it cannot be impeached in certain collateral proceedings where there was an ample remedy by a writ of error, or for an action for a false return, as where in an action for trespass an officer justifies an arrest under a justice's execution; that it cannot be shown that he fraudulently served the original process (*Wheeler agt. Latham*, 14 *Johns.*, 481; *Putnam agt. Man*, 3 *Wend.*, 202; *Allen agt. Martin*, 10 *id.*, 300; *Crocker on Sheriffs* [2d ed.], sec. 44, p. 30; *Sewell on Sheriffs*, 386).

The general rule is thus stated in a very reliable work (*Warson on Sheriffs*, p. 72), "Credence is given to the return of the sheriff, so much so that there can be no averment

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against the sheriff's return in the same action, although a party in any other action or in an action against the sheriff may show that such a return is false;" which statement of the general rule is sustained by the older and higher authority of Dalton, whose statement of the law upon the subject may be substantially translated as follows: "As the sheriff is an officer deputed by the law and by the king for his courts, no one will be allowed to contradict or traverse (*'admit de averrer directment encounter'*) his return, except in some special cases, the reason being that justice must be administered; that the judges who administer it must necessarily put trust and confidence in such a person; and that if every one could contradict the returns of the sheriff, justice would be obstructed by their acts and delays; and yet sheriffs and their officers have often been found faulty on their part in making their returns, &c., which, in fact, arises from corruption, and partly by their negligence and remissness; and as the making of such false returns is mischievous to the subject, the statutes and laws of the realm have allowed men, in some cases, to contradict the return of the sheriff (*de aver encounter le retourne del vic.*)" (*Dalton on Sheriffs*, chap. 42, pp. 189 and 190). But whatever the rule may be, the sheriff here offered the return to show, in mitigation of damages, the actual amount he had received; and on the authority of this very case of *Townsend agt. Olin* (*supra*), the plaintiff was entitled to show that the return was not correct, and that the sheriff had received a larger amount.

It was further objected to this evidence that the plaintiff had brought an action to recover treble damages against the defendant for taking, in this case, excessive fees, in respect to which it is sufficient to say that the action was brought after the present action was commenced and the cause of action here had accrued; and that nothing was determined in that action, as the complaint was dismissed because it was not properly brought. It is by no means clear that the liability of the sheriff, under the statute, for taking excessive fees, if

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there had been a recovery, would have been material upon the question of damages in this action ; but if it would there was no recovery, the action being dismissed. It is therefore incumbent upon the plaintiff to prove, under the issue joined, that the plaintiff was a corporation, and that the execution returned as collected in part was founded upon a valid judgment. The time to make that objection to the plaintiff's recovery was when the motion was made for judgment upon the pleadings, when proof of both these facts might have been supplied. It appears from the order giving judgment upon the pleadings that the motion was opposed, and that the parties had consented in writing that the damages might be assessed by the judge holding the trial term, on the 17th of August, 1878, who assessed them at the nominal amount of six cents, from which the plaintiff appealed, and the general term of the marine court ordered another assessment. It does not appear that any such objection as the want of this proof was raised before judge GOEPP, and it is inferable that it was not, as in his written opinion the only questions he discusses are these that I have already considered, and which are the questions mainly relied upon by the defendant in the appeal to this court. The objection was made, during the assessment before judge SHERIDAN, of the want of proof of a judgment ; but the plaintiff gave the execution in evidence, with the defendant's return in writing that he had made \$387 upon it ; and the answer given to the objection was that, it appearing by the return that the sheriff had acted upon the execution, and that he had made \$387 upon it, and had paid that amount to the plaintiff, it was not necessary to prove the judgment upon which the execution was issued. I think the objection was then too late. It should have been made to the judge before whom the motion was argued for judgment upon the pleadings, when the proof of it, as well as of the corporate character of the plaintiff, might have been supplied ; or it should have been raised on the appeal to the general term of the marine court. The previous assessment was at a nominal

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sum, with which the defendant was satisfied, as he did not appeal; and if he meant to rely upon the want of this formal proof, it was his duty to have raised this objection then, when the plaintiff brought an appeal to obtain, which he did, a reassessment, a proceeding that was unnecessary, and which involved loss of time and expense, if the judgment given upon the pleadings was defective in assuming the existence of facts that had not been proved. I do not think it necessary to consider whether the proof should have been given under the pleadings or not, as, in my opinion, the defendant is not entitled to have the judgment reversed on the appeal to this court, for the want of this formal proof, having made no such objection when the plaintiff on the trial before judge GOEPP moved for judgment on the issues presented by the pleadings, and when, for all that we know, the proof might then have been supplied if the objection had been made of the want of it (*Doane* agt. *Eddie*, 16 *Wend.*, 525, 526; *Jackson* agt. *Davis*, 5 *Cow.*, 127; *Pierce* agt. *Sackett*, *Lalor Rep.*, 115; *Lawrence* agt. *Barker*, 5 *Wend.*, 304, 305; *Meritt* agt. *Seaman*, 6 *Barb.*, 335; *Patterson* agt. *Westervelt*, 17 *Wend.*, 545; *Beekman* agt. *Bond*, 19 *id.*, 444; *Ryerss v. Wheeler*, 15 *id.*, 439; *Ford* agt. *Monroe*, 20 *id.*, 211; *Jackson* agt. *Chintman*, 4 *id.*, 283; *Underhill* agt. *Pomeroy*, 2 *Hill*, 603).

In my opinion the judgment should be affirmed.

Claflin & Co. agt. Hamlin.

SUPREME COURT.

H. B. CLAFLIN & Co. agt. JOHN W. HAMLIN and F. N. HAMLIN.

Injunction — Power of supreme court to restrain the prosecution of actions in other states.

While, as a general rule, the courts of this state will decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the courts of a sister state, there are exceptions to this rule; and where a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it.

Thus, when F. N. Hamlin and Robert W. Hale (now dead) were, in 1871, copartners in business in Chicago and were burned out by the great fire of that year their indebtedness amounted to over \$1,000,000 and the plaintiffs were the largest creditors. A compromise was effected for fifty cents on the dollar. F. N. Hamlin started in business again with another partner, the plaintiffs loaning the new firm large sums of money. F. N. Hamlin, in 1876, being refused a loan of \$15,000 by the plaintiffs, charged them with having received more than they were entitled to under the compromise, and has since brought a number of suits against them in Illinois in the name of his father alleging conspiracy on their part with his former partner, Hale, to defraud the other creditors. The plaintiffs assert that the suits are brought for blackmailing purposes, and that the assignments from creditors of Hamlin's firm, on which they are based, have been decided to have been obtained by fraudulent representations:

Held, that this is one of those *special cases* which warrant the court in exercising its power, and that the suit brought by John W. Hamlin in the state of Illinois was not brought in good faith and was brought for the purpose of vexing, annoying and harrassing the plaintiffs in this action, and, therefore, the preliminary injunction should be continued until the cause can be tried.

Special Term, October, 1881.

THE plaintiffs have brought suit in the supreme court against John W. Hamlin and F. N. Hamlin to restrain the

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defendants from harrasing them by alleged groundless litigations in other states, and to compel the Hamlins to submit all matters in controversy to the court in the present action.

F. N. Hamlin and Robert W. Hale (now dead) were, in 1871, copartners in business in Chicago and were burned out by the great fire of that year. Their indebtedness amounted to over \$1,000,000, and H. B. Claflin & Co. were their largest creditors. A compromise was effected for fifty cents on the dollar. F. N. Hamlin started in business again with another partner, H. B. Claflin & Co. loaning the new firm large sums of money. F. N. Hamlin, in 1876, being refused a loan of \$15,000 by H. B. Claflin & Co., charged them with having received more than they were entitled to under the compromise, and has since brought a number of suits against them in Illinois in the name of his father, John W. Hamlin, alleging conspiracy on their part with his former partner, Hale, to defraud the other creditors. The plaintiffs assert that the suits are brought for blackmailing purposes, and that the assignments from creditors of Hamlin's firm, on which they are based, have been decided to have been obtained by fraudulent representations.

Vanderpoel, Green & Cuming, for plaintiffs.

Emery Storrs and *Daniel P. Mahony*, for defendants.

LAWRENCE, J. — It was held by this court in the case of *Vail* agt. *Knapp* (49 *Barb. S. C. R.*, 299) that while, as a general rule, the courts of this State will decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the courts of a sister state, there are exceptions to the rule; and that where a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud, and that no rule of comity or policy forbids it.

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Judge INGALLS, in delivering the opinion of the court in that case, refers with approbation to the following language of Mr. justice STORY in his *Equity Jurisprudence*: "Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act in *personam* upon those parties and direct them by injunction to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but without regard to the situation of the subject-matter of the dispute they consider the equities between the parties and decree in *personam* according to those equities and enforce obedience to their decree by process in *personam*."

In *Dehon* agt. *Foster* (4 *Allen*, 550) BIGELOW, Ch. J., says: "The authority of this court, as a court of chancery, upon a proper case being made to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state or of other states or foreign countries is clear and indisputable. In the execution of this power courts of equity proceed, not upon any claim of right to interfere with and control the course of proceeding in other tribunals, or to prevent them adjudicating on the rights of parties when brought in controversy and duly presented for their determination, but the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to restrain them from doing acts which will work an injury to others, and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country."

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In *Engel* agt. *Scheurman* (40 *Ga.*, 206) the Georgia court of chancery enjoined the defendant, a citizen of Georgia, from proceeding against the plaintiff in the courts of this state, and the court say: "In restraining him by injunction from enforcing this unconscientious demand in the state of New York, the court acts upon his conscience in *personam* and not upon the courts of that state. The person of the defendant is within the jurisdiction of the court, the proceedings in the courts of the state of New York are not, and we do not interfere with them" (*See, also, Kittell* agt. *Kittell*, 8 *Daly*, 72; *Cranstoun* agt. *Johnson*, 3 *Ves. Jr.*, 183; *Erie Railway* agt. *Ramsay*, 45 *N. Y.*, 637; *remarks of FOLGER, J., at pages 648 and 649; Manie* agt. *Watts*, 6 *Cranch*, 148).

Guided by these authorities I reach the conclusion that it is within the power of this court to restrain the defendant John W. Hamlin, who at the time of the commencement of this action and at the time of the granting of this injunction was a citizen of the state of New York, from prosecuting the action in the courts of a sister state; and the only question, therefore, remaining to be determined is whether this is one of those special cases which must exist in order to warrant the court in exercising its power. Having read over all the affidavits and papers in this case I am forced to conclude that the suit brought by John W. Hamlin in the state of Illinois was not brought in good faith, and was brought for the purpose of vexing, annoying and harrassing the plaintiffs in this action, and that therefore the preliminary injunction granted by Mr. justice DONOHUE should be continued until the cause can be tried.

Harper agt. Goodall.

N. Y. COMMON PLEAS.

EDWARD B. HARPER, plaintiff and appellant, agt. ALBERT G. GOODALL, defendant and respondent.

Broker—Commissions—What must be shown to sustain action for.

A broker to sustain an action for commissions must show direct employment of the principal, or a direct authority for him to treat with the agents of the principal.

The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown.

General Term, November, 1881.

APPEAL by plaintiff from judgment of justice GEDNEY, of eighth district court, dismissing complaint. Action for commissions as broker in procuring tenants for 339 West Thirty-fourth street. Defense—No employment of defendant.

Henry T. Dewey and George W. Brush, for appellant.

D. M. Porter and George H. Kracht, for respondent.

J. F. DALY, J.—The plaintiff had no personal transaction with defendant, neither had his clerks and agents. The latter acted upon the assumption that defendant's wife and daughter had authority to employ them. No authority can be assumed in a case like the present. The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown. There was no ratification, for defendant is not shown to have accepted the fruits of plaintiff's efforts with full knowledge of the facts. The proper course for the plaintiff would have been to secure a direct employment from defendant, or direct

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authority from him to treat with the latter's wife or daughter on the subject.

It would be too severe to hold the head of a family responsible for such admissions and declarations as a shrewd broker or his active clerk, who is "working up the case" may be able to extort from a wife and daughter or other members of the family.

The judgment should be affirmed.

VAN HOESEN, J., concurs.

N. Y. COMMON PLEAS.

BERNARD REILLY, as sheriff, &c., respondent, agt. JAMES A. COLEMAN, impleaded, &c., appellant.

Sheriff—Bond of indemnity given to, applies to a levy made before the bond was given.

A bond of indemnity given to the sheriff applies to a levy made before the bond was given; and the defendant, in a suit by the sheriff upon the bond, is charged with the knowledge of the prior levy and sale by the giving of the bond, unless he gives affirmative proof upon the trial of ignorance of those facts.

General Term, June, 1881.

Before DALY, C. J., VAN BRUNT and VAN HOESEN, JJ.

THE action was upon a bond of indemnity signed by the defendant and given to the sheriff. The levy and sale under the execution issued upon the judgment mentioned in the instrument was had before the bond was given. Actions were brought against the sheriff for the taking and sale of the property and recovery had.

E. H. Benn, for appellant.

Henry Thompson, for respondent.

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PER CURIAM.—The important question presented is, whether the condition of the bond is broad enough to cover the indemnity awarded by the judgment of the court below. The obligators bound themselves to save the sheriff harmless “of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, attachments, fines, special proceedings and executions that shall or may at any time arise * * * for or by reason of the levy, taking and making sale, under or by virtue of such execution, of all or any personal property which he or they shall or may judge to belong to the said judgment debtor.” * * *

The defendant is charged with the knowledge of the prior levy and sale by the giving of the bond. If he desired to avail himself of ignorance of those facts, he should have given affirmative proof to that effect upon the trial.

In *Griffith agt. Hardenburg* (41 N. Y., 464), the court held, in substance, that the condition of the bond covered the prior levy, and a tortious act committed by the sheriff under the defendant's direction. As to the latter it needed proof of the direction to hold the defendant liable, to indemnify, where the recovery was had solely for the tortious entry. That question is not here involved. The case of *Allston agt. Conger* (66 Barb., 272), seems in point. The bond was there held to apply, although the levy had been made before it was given. The court says: “It is not to save him harmless from any levy he may thereafter make, but from any levy under the execution described. * * * The fact that the levy was made before the bond was given does not affect the question. A previous levy is equally within the condition of the bond.”

This instrument was given to protect the sheriff against any judgment which might arise from his making sale under the execution mentioned in it. Though the sale had been made before, the judgment was not recovered until after bond was given.

The judgment must be affirmed, with costs.

Negus agt. City of Brooklyn.

SUPREME COURT.

JOHN D. NEGUS agt. THE CITY OF BROOKLYN and others.

Brooklyn Elevated Railway — Power of the supreme court to prevent (by injunction) the common council from passing over the mayor's veto a resolution changing the route of such railway — The consent of the board not sufficient without that of the mayor — No right to change the route since the constitutional amendment of 1875 — The receiver no power to accept the franchise to be conferred by the common council — The resolution a gross perversion of any discretion, and tending to establish a public nuisance.

The Bruff Elevated Railway Company of Brooklyn was incorporated by an act passed May 26, 1874. The authority conferred upon it to appropriate the streets in the city is contained in section 3 of that act and is as follows: (After reciting the route as fixed between the East river suspension bridge and Woodhaven, Queens county) the latter part of the act reads thus: "Or on such streets and avenues as may be named by the mayor and common council of the city of Brooklyn as being more suitable for carrying out the objects contemplated in the erection of said railway." The common council passed a resolution, which, in effect, authorizes an elevated railroad to be constructed upon Fulton street and Myrtle avenue and several other streets not named in the said act of incorporation. The mayor vetoed the same. They claim the right to pass said resolution under the last clause of section 3 of the charter, and this nearly eight years after the corporate franchise was granted, and a considerable time after the railway company had appropriated the streets named in its charter to its corporate uses. The common council proposes to pass the resolution over the mayor's veto, and an injunction is sought by the plaintiff, who sues in behalf of himself and others similarly situated to restrain such proposed action.

Held, first. That the court has the power to prevent the commission of illegal acts by the members of the common council in a proper case and at the suit of the proper parties. The members of the common council are mere agents with defined and limited powers. While the court cannot rightfully control the proper exercise of the discretion vested in them, yet when they threaten an abuse or illegal exercise of such discretion, and especially when they claim the right to exercise powers which they do not possess, it is the duty of the court to interpose its authority whenever it becomes necessary for the protection of public or private rights or interests.

Second. The right of the plaintiff to maintain this action rests: First. Upon the familiar principle that one who will be especially injured by the

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creation of a public nuisance, may invoke the interposition of the court to prevent it. Second. Upon that provision of the charter of the city of Brooklyn, which makes the aldermen the trustees, and the resident taxpayers *cestuis que* trustees in respect to the property intrusted to the care of the former; and, Third. Upon the act of 1881, chapter 531, which expressly authorizes the prosecution of all officers, agents, &c., acting on behalf of any municipal corporation, by taxpayers, by action to prevent any illegal act.

Third. That the consent of the board of aldermen is not sufficient without that of the mayor. The statute plainly requires the consent of both. The unanimous consent of the common council would not be an effectual execution of the power, much less would the consent of two-thirds of the members thereof, however manifested. Nor was the exercise of the power committed to a single board composed of the mayor and common council. But if such was the nature, it could be exercised only upon a meeting of all, or a meeting of a majority, upon due and reasonable notice.

Fourth. That the company having elected to adopt the route designated in the charter, and the mayor and common council having acquiesced therein, such election has barred all parties concerned, and has put an end to the power to change the route so designated.

Fifth. That the power to change the route was also annulled by the amendment to article 3 of the constitution, which took effect January 1, 1875.

Sixth. That the action of the common council would be ineffectual for lack of power in the receivers of the railroad company to accept the new privileges or franchises which the common council purpose to confer.

Special Term, December, 1881.

MOTION by plaintiff to continue the injunction enjoining the common council from passing over the mayor's veto the resolution changing the route of the Bruff railway.

David Barnett, Herbert G. Hull, T. C. Cronin and Erastus Cook, for plaintiffs.

Winchester Britton, for the common council.

Joshua M. Van Cott, for the receivers.

GILBERT, J. — The Elevated Railway Company, defendant, was incorporated by an act passed May 26, 1874. The authority

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conferred upon it to appropriate the streets in the city is contained in section 3 of that act, and is as follows: (Here the route is recited as fixed between the East river, Suspension Bridge and Woodhaven, Queens county), the latter part of the act reading thus: "Or on such streets and avenues as may be named by the mayor and common council of the city of Brooklyn, as being more suitable for carrying out the objects contemplated in the erection of said railway." The common council claim the right, under the last clause of the above section of the charter, to pass the resolution which in effect authorizes an elevated railroad to be constructed upon Fulton street and Myrtle avenue, and several other streets not named in the said act of incorporation. They claim to exercise such a power nearly eight years after the corporate franchise was granted, and a considerable time after the railway company had appropriated the streets named in its charter to its corporate uses. An injunction is sought by the plaintiff, who sues in behalf of himself and others similarly situated, to restrain such proposed action of the common council.

It is too late to deny the power of the court to prevent the commission of illegal acts by the members of the common council in a proper case and at the suit of proper parties. The members of the common council are mere agents with defined and limited powers (1 *R. S.*, 337, *sec.* 22; *Id.* 599 *secs.* 1 and 3). While the court cannot rightfully control the proper exercise of the discretion invested in them, yet when they threaten an abuse or illegal exercise of such discretion, and especially when they claim the right to exercise powers which they do not possess, it is the duty of the court to interpose its authority whenever it becomes necessary for the protection of public or private rights or interests. The action of the common council which the plaintiff asks the court to restrain, if unauthorized, must result in the creation of a public as well as private nuisance, for no argument is necessary to show that such an interference with a street as would follow from the construction and operation

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thereon of an elevated railroad for the transportation of passengers and merchandise by means of steam power, would detract from the ordinary uses of the street and disturb the comforts of the citizens whose houses abut thereon, and if done without legal authority would be a nuisance *per se*. The right to interfere with streets exists only under statutes which confer the authority expressly or by clear implication. The right of the plaintiff, therefore, to maintain this action rests (1) upon the familiar principle that one who will be especially injured by the creation of a public nuisance may invoke the interposition of the court to prevent it; (2) upon that provision of the charter of the city of Brooklyn which makes the aldermen the trustees and resident taxpayers *cestuis que* trustee in respect to the property intrusted to the care of the former (*title 19, sec. 20*); and (3) upon the act of 1881, chapter 531, which expressly authorizes the prosecution of all officers, agents, &c., acting on behalf of any municipal corporation, by taxpayers by action to prevent any illegal official act. The principle stated is well established independently of any statute (*Hodges agt. City of Buffalo*, 2 *Duer*, 110; *Davis agt. Mayor*, 1 *Duer*, 451; 14 *N. Y.*, 510; *Rosevelt agt. Draper*, *Id.*, 318; *Ayres agt. Lawrence and another*, *Com.*, 59 *N. Y.*, and cases cited; *Demarest agt. Wickham*, 63 *id.*, 320; *Dill. Mun. Corp.*, *sec. 922*, and cases cited). I pass by the allegations of fraud and corruption contained in the complaint. They are vague and indefinite, and are made upon information and belief only. They are denied by the affidavits of persons who must have been privy to the fraud or corruption, if any had existed. Whatever unfavorable impressions may be drawn by private persons from the character or conduct of the individuals assailed, the court can act only upon evidence sufficient to prove the facts alleged. The allegation that a large sum had been offered for the privileges conferred by the resolution in question is of no legal significance, for the reason that the common council had no power to accept the offer. The right to dispose, by special

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grant, of the use of the streets of the city to railroad corporations without the consent of owners of the property thereon, no longer exists in the common council or in the legislature.

The decisive questions, therefore, are: 1. Whether the common council can exercise the power claimed, assuming its existence, in the mode adopted by them? and, 2. Whether the power originally granted is still in force? Both questions must, I think, be answered in the negative. The power forms no part of the mass of legislative powers which have been delegated to the common council by the city charter, but is a special authority conferred upon the mayor and common council by the statute incorporating the railroad company (*See Matter of North agt. Cary*, 4 *N. Y. Sup. Ct. [T. and C.]*, 357; *New York and Brooklyn Saw Mill Co. agt. City*, 71 *N. Y.*, 580). The statute plainly requires the consent of both. The unanimous consent of the common council would not be an effectual execution of the power, much less would the consent of two-thirds of the members thereof, however manifested. Nor was the exercise of the power committed to a single board composed of the mayor and common council. But if such was its nature, it could be exercised only upon a meeting of all or a meeting of a majority upon due and reasonable notice to the others (2 *R. S.*, 555, *sec. 27*; *People agt. Nichols*, 52 *N. Y.*, 481). Upon either view of the subject the proposed action of the common council would be illegal. I am also clearly of opinion that the power has ceased to exist. It was conferred in 1874. The company has erected portions of its road and partially completed the same throughout the route designated in its charter, and on the 1st of September, 1879, mortgaged its railroad constructed, or to be constructed, including all the railways, ways and rights of way, acquired or to be acquired. Whatever has been done by the company toward the construction of its road has been done upon the streets named in its charter, and each of such streets has to a greater or less extent been

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used by the company for the purposes of its incorporation. In September, 1880, the company was adjudged to be insolvent, and receivers were appointed of all its property, franchises and effects. The authorities of the city acquiesced in the use of the streets designated in the charter of the company, and neither the company nor the mayor or common council intimated in any manner that the streets so designated were not the most suitable for the objects contemplated by the legislature. I think, therefore, that the company elected to adopt the route designated in the charter, and that the mayor and common council have acquiesced therein. Such election has barred all parties concerned, and has put an end to the power to change the route so designated. The power to change the route was also annulled by the amendment to article 3 of the constitution, which took effect January 1, 1875. It matters little by what name the act of "naming streets more suitable" may be called. The legal effect of such an act would be to grant to the railroad company rights which it does not now possess, namely, a right to lay down railroad tracks, and also an exclusive privilege to operate a railroad thereon. That would be a plain violation of section 10 of said article 3. The legislature itself now possesses no power to make such a grant. That was abrogated by the constitutional amendment. The power of the common council, being derived from a legislative act, is, so far as the same remains unexecuted, also abrogated, for a derivative power cannot survive an original power. The effect here given to the amendments of the constitution has been declared in several decisions of the court of appeals. In *Falconer and another agt. The Buffalo and Jamestown Railroad Company* the issue of bonds in aid of the construction of a railroad under the town bonding act of 1869, was arrested because the condition upon which the right to the bonds depended, namely, the construction of the railroad through the village of Jamestown had not been fully performed when the amendment took effect.

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Judge FOLGER, in delivering the opinion of the court, said: "It is not to be questioned that as soon as they (the amendments) become a part of the constitution all action of towns not yet finished toward the issue of bonds, in aid of any corporations, at once fell to the ground, unless there had, by operation of law, or in pursuance of some authorized and valid agreement, been created a right to have such action perfected by the issuing of bonds." The same principle was decided in the case of the *People ex rel. Hetfield agt. The Trustees of the Village of Fort Edward* (71 N. Y., 28). In the *Matter of the New York Elevated Railroad Company* (71 N. Y., 327-349), the same court held that "where a special act was passed prior to 1875, creating a private corporation, an act to amend its charter would be a private one, and it could not, therefore, grant the right to lay down railroad tracks, and that nothing could be done by the legislature under the power to alter acts of incorporation, which it could not constitutionally do by an original bill." The successive extensions of the time limited by the charter of the company for the commencement or completion of its road, therefore, while they may have been operative as waivers of the forfeiture, do not continue in the mayor and common council the power to authorize the company to construct its road upon streets not designated in its charter. Furthermore, the power granted was not one which authorized an extension of the original grant contained in the charter of the company, by the addition of other streets to those designated thereon. On the contrary, it gave to the company merely the alternative right of using those streets or others in lieu of them. The proposed resolution is, in my judgment, plainly illegal, in that it permits the company to use the streets named in its charter, and many others, and thus established additional routes not intended by the legislature. For instance, the company, if the action of the common council should become effectual, would acquire under a grant of the right to construct and operate a railroad from the East river bridge to

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Woodhaven, the right to construct one from Adams street, through Myrtle avenue and Broadway, to another terminus at the ferry at the foot of the latter street. Other like instances might be mentioned. Such a palpable perversion of the grant would have to be condemned, even if the power claimed by the common council were still in force. Finally, the action of the common council would be ineffectual for lack of power in the receivers of the railroad company to accept the new privileges or franchises which the common council purpose to confer. The mortgage of its property and franchise before mentioned is in process of foreclosure. No power was conferred upon the receivers by the orders appointing them, to obtain or accept the extension of the company's franchises proffered by the common council. Receivers appointed *pendente lite*, except in cases (of which this case is not one), where by statute they are made assignees, have no powers which have not been conferred upon them by the order for their appointment. They are officers of the court, and their duty is merely to protect the property or fund during the litigation. Their acts are the acts of the court when duly sanctioned, but when not so sanctioned they have no greater effect than the acts of other unauthorized officers or agents (*Foster agt. Townsend*, 68 *N. Y.*, 206; *Keeney agt. Home Ins. Co.*, 71 *id.*, 396; *Finke agt. Finke*, 2 *Dept. MSS. and cases cited*). The receivers, in their affidavit, which was read in opposition to this motion, set forth that the decree in the foreclosure suit referred to is about to be entered, and that a reorganization of the railroad company has been agreed upon, which reorganized company will be abundantly solvent. The long and short of the matter in hand then is, that the object of obtaining the proposed extension of and addition to the route of the railroad was that the purchasers of the property and franchises of the railroad company might organize a new corporation, and so make the new franchises available for their benefit, as well as the old ones, and this was to be accomplished through the action of officers

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of this court. It is enough to say that the court has not sanctioned, and is not likely to sanction, the acquisition of privileges or franchises for the benefit of creditors of insolvent corporations at the expense or to the detriment of any citizen. It was urged on the argument that an injunction should not be issued to restrain the passage of the proposed extension, because if it should be illegal it would be void, and, therefore, no injury could result therefrom to the plaintiff. The answer is that the resolution would give a colorable authority, to resist which would require a multiplicity of suits.

I think the injunction should be continued in such form as to effectually restrain the passage of the proposed resolution and the exercise in any manner of the power of naming more suitable streets, which was granted by the charter of the railroad company, and that the plaintiff should have ten dollars costs of this motion.

NOTE. — Despite the order of judge GILBERT continuing the injunction, the seventeen aldermen who adopted the resolution passed the same over the veto of the mayor. Proceedings were taken and an order obtained by Mr. David Barnett, counsel for the property owners, requiring the seventeen aldermen to show cause why they should not be punished for contempt. After a hearing of both parties, judge GILBERT imposed a fine of \$250 upon each of the aldermen, and from ten to thirty days imprisonment in the county jail. An appeal has been taken by the counsel of the aldermen and a stay has been granted, and the aldermen released from jail. — [Ed.]

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SUPREME COURT.

MARY S. BRADLEY agt. THEODORE W. DWIGHT, THE PRESIDENT AND FELLOWS OF YALE COLLEGE, WILLIAM STEINWAY, THE NEW YORK MEDICAL COLLEGE AND HOSPITAL FOR WOMEN *et al.*

The law of escheat — Complaint — Demurrer — Claims against equity.

An allegation in a complaint that B. died seized of lands, intestate, unmarried and without issue, leaving him surviving a *father*, an alien, who died intestate and without living descendants, whereby the land escheated, is not, *on demurrer*, a sufficient allegation to make it affirmatively appear that the father died without heirs having legal capacity to take.

It is the settled law of this state that descent between brother and sister is *immediate*, notwithstanding the *alienage* of the parent, and, therefore, the allegation in the complaint that the lands escheated was an unauthorized conclusion.

B., being seized of lands in fee, mortgaged them to C. The lands were afterwards conveyed to D., who died unmarried, intestate and without issue, leaving him surviving a father, an alien, who also died intestate without leaving descendants. Afterwards, in 1843, the mortgage was foreclosed in chancery, but the state to whom it was alleged the lands had escheated were not made a party. The legislature released the property to the plaintiff, who brings suit to redeem against the holders under foreclosure, who have been in undisputed possession for thirty-eight years. No notice of the application to the legislature was given the defendants as required by Laws of 1829, chapter 259:

Held, that the plaintiff shows no ground of equitable relief. A court of equity should not lend its aid in furtherance of such a claim.

Special Term, December, 1881.

Theodore W. Dwight, George W. Cotterill and Everitt P. Wheeler, for demurrants.

Ralph T. Woods, opposed.

LARREMORE, J.—It appears by the complaint that on January 26, 1828, Abraham Bell, who was seized in fee of

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the premises in dispute, mortgaged the same to "The New York Contributionship for the insurance of houses and property from loss by fire," as security for the payment of \$6,000 on December 1, 1830.

By several *mesne* conveyances the title of the premises vested in Richard Byrd, April 30, 1828, subject to said mortgage, who, it is alleged, died seized thereof, unmarried, intestate and without issue, leaving him surviving his father Joseph Byrd, who was an alien, and died May 10, 1838, intestate, and without living descendants, whereby the land escheated to the people of the state of New York. The mortgage of January 26, 1828, was foreclosed, and in pursuance of a decree of the court of chancery the premises were sold and conveyed to Morris Ketchum, July 8, 1843, for the sum of \$7,000, who entered into and has continued in possession thereof by himself and his assigns — the defendants — until the commencement of this action.

It is further alleged that the people of the state of New York were not a party to the foreclosure suit and their right of redemption has not been barred, but that the same, by certain acts of the legislature, has been released and is now vested in the plaintiff, who brings suit to redeem the premises from the lien of the mortgage, upon an offer to pay any sum due thereon after deduction of the rents, gains and profits realized therefrom.

To this claim the defendants severally demur and insist that no just cause of action is shown.

By the law of this state all lands are declared to be allodial, subject only to the liability to escheat. All feudal tenures of every description are abolished, and the entire and absolute property in lands is vested in the owners according to the nature of their respective estates (*State Constitution, art. 1, secs. 11, 12 and 13*). By the force of constitutional law, legislative enactment and the jurisprudence of the state, escheat — a remnant of the feudal tenure — depends upon defect of heirs as the essence of its support.

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The gravamen of the complaint is, that Richard Byrd, who was seized of the premises in dispute, died March 25, 1837, unmarried, intestate and without issue, leaving him surviving his father, Joseph Byrd, who was an alien, and died intestate and without living descendants, and that thereby the property escheated to the people of the state of New York.

At common law a parent could not inherit from a child (*McLean* agt. *Swanton*, 13 *N. Y.*, 542). The enabling statutes in this respect (*Laws* 1786, *chap.* 12; *R. S.* [5 *Edm.*], 702-3) were in derogation of the common law. The statute provides that if either parent be incapable of inheriting, then the lands shall descend to the remotest possible heir.

It is settled by judicial authority that the descent between brother and sister is immediate, notwithstanding the alienage of a parent (*Lulus* agt. *Eimer*, 15 *Hun*, 400; 80 *N. Y.*, 179; *Jackson* agt. *Green*, 7 *Wend.*, 337). Therefore the allegation in the complaint that the lands escheated was an unauthorized conclusion.

The spirit and policy of our law does not favor an extension of the doctrine of escheat. This is manifested by repeated enactments (*Laws* 1868, *chap.* 513; *Laws* 1872, *chap.* 141; *Laws* 1877, *chap.* 111), that the title of a citizen of this state in actual possession of lands shall not be questioned or impeached by reason of the alienage of any person from or through whom such title may have been derived. By these acts the rights of the state in any case in which proceedings for an escheat have been instituted, as well as the rights of devisees, mortgagees and creditors, are saved and excepted.

In *Jackson* agt. *Adams*, (7 *Wend.*, 367), a well considered distinction is shown between a citizen and an alien dying without heirs. In the former case it is decided that the state had no right of entry or possession of his lands until office found.

The mortgage of January 26, 1828, was a valid and unquestioned lien, and the decree of foreclosure thereupon, entered June 23, 1843, authorized a sale of the premises upon which

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the purchasers thereof have remained in undisturbed and undisputed possession for thirty-eight years. Until the present suit, they have had neither actual nor constructive notice of any adverse claim, and if one may not "sleep upon such title," then all legal provisions to that effect are inadequate and ineffectual.

No notice was given of the application to the legislature for a release of the property in question (*Laws* 1829, *chap.* 259), and the defendants, who are *bona fide* purchasers thereof, are sought to be charged with a forfeiture of their rights therein in favor of a claimant who shows no ground for equitable relief. A court of equity should not lend its aid in furtherance of such a claim. The defendants, as representatives of the mortgagor, could at least hold the title against all claimants, except the state, and against it, until the escheat is established by judicial proceedings (*Wright agt. Saddler*, 20 *N. Y.*, 324).

The demurrer should be sustained — first, because it does not affirmatively appear that Richard Byrd died without heirs having legal capacity to take; second, that as against these defendants, the plaintiff has not acquired a legal or valid title to the property.

The conclusion dispenses with the consideration of the other points raised upon the argument.

There should be judgment for the defendants on the demurrer without prejudice to the plaintiff, if so advised, to make special application for an amendment of her complaint.

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SUPREME COURT.

COMBS and another agt. COMBS.

Costs—upon appeal from justice's judgment to general term are discretionary—Such costs cannot be taxed unless awarded—What costs apply only to courts of record—Code of Civil Procedure, sections 3228, 3238, 3347.

Where the costs are in the discretion of the court, they are not recoverable unless specially awarded, and when none are awarded the party must establish that he is entitled to them as of right on the affirmance, or he cannot recover them.

Where the defendant carried an appeal from the judgment of a justice's court to the general term of the supreme court, and the judgment was there affirmed, the entry of the decision being simply "judgment affirmed," without any direction as to costs:

Held, that the plaintiff was not entitled, of course, to costs upon appeal, and that the costs being in the discretion of the court, and not having been awarded to the plaintiff, they could not be taxed.

The costs awarded by section 3228 of the Code of Civil Procedure, apply only to actions in certain of the courts of record.

As section 3228 has reference to actions in certain courts of record only, and as by subdivision 2 of section 3238, in every other case upon appeal from a final judgment, the costs are in the discretion of that court, it follows that on an appeal from a justice's judgment to the general term of the supreme court, the costs are in the discretion of the court, and cannot be taxed unless awarded (*See Clark agt. Carroll*, 61 *How.*, 47).

Monroe Special Term, March, 1881.

MOTION by defendant to strike out the costs of appeal inserted in a judgment of affirmance, on appeal from a judgment of a justice's court to the general term of the supreme court. The facts are fully stated in the opinion.

J. M. Dunning, for motion.

J. B. Bennett, opposed.

RUMSEY, *J.*—This action was originally brought in a justice's court, and the plaintiff recovered a judgment.

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On appeal to the county court the judgment was modified to some extent, and as modified affirmed, without costs to either party. From the judgment of the county court the defendant appealed to the general term, where the judgment was affirmed, the entry of the decision being simply "judgment affirmed," with no direction as to costs of the appeal. The plaintiff claiming that he was entitled to costs as of right, taxed the costs of his appeal against defendant's objection, and entered a judgment of affirmance, and for \$142.18 costs. The defendant now moves to strike these costs out of the judgment.

It is conceded that where the costs are in the discretion of the court they are not recoverable unless specially awarded (*Commissioners of Pilots agt. Spofford*, 3 Hun, 52). And, as none were awarded, the plaintiff must establish that he is entitled to them as of right on the affirmance, or he cannot recover them.

The question is, whether in an appeal of this kind the award of costs is governed by subdivision 1 of section 3238 of the Code of Civil Procedure, or by subdivision 2 of that section. A short examination of the regulations of the Code regarding costs will enable us to decide this question.

The Code of Civil Procedure contains provisions by which the right to costs, and the amount of costs in all actions and in every court are regulated as to each class of courts. The rules for costs are stated in the chapter which prescribes the practice in those courts. Thus the regulations as to costs in surrogates' courts are found in section 2558, *et seq.*; and the regulations as to costs of justices of the peace are at title 9, chapter 19, which is the chapter regulating proceedings in those courts. The general regulations respecting costs are found in chapter 21 of the Code. The first section of that chapter (*sec.* 3228) prescribes the class of actions in which plaintiff is entitled to costs, of course. It is apparent that the actions there mentioned are those which must be brought in certain of the courts of record, and of which justices of

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the peace have no jurisdiction, for the costs in such actions are prescribed in title 9, chapter 19.

By reference to section 3347, subdivision 13, we find that this section 3228 applies only to an action in the supreme court, the superior city courts, &c., and in construing section 3228 it should be read as though subdivision 13 of section 3347 was incorporated with it thus: "The plaintiff is entitled to costs, of course, upon the rendering of a final judgment in his favor in either of the following actions, *triable in the supreme court, &c.*" Thus constructed the rules of the Code are complete and uniform, and apply to all courts and all actions in courts of original jurisdiction, and not on appeal.

Section 2558 and those following prescribe the rules for surrogates' courts. Title 9, chapter 19, lays down the rules applicable to justices' courts, and chapter 21, sections 3228 to 3236, control the award of costs in actions which may be tried in the supreme court.

But none of these sections control the award of costs in appeals in the supreme court (3237). As to those, section 3238 alone controls. Turning to that section, we see that it prescribes, in subdivision 1, the only cases in which costs on appeal are a matter of right, and those cases are simply in the actions specified in section 3228.

We have seen that that section refers to cases which are tried in courts of record (not including surrogates' courts), and to no others. In every other action costs are in the discretion of the court. This action is clearly, to my mind, not one of those specified in section 3228, and the costs not having been awarded to respondent, she cannot be taxed. It follows that the costs of the appeal were not properly inserted in the judgment.

But it appears from the papers, that a portion of this judgment consists of eighteen dollars and twenty-five cents, awarded to plaintiff by the general term on a former appeal, and it seems to be conceded that those costs have not been

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paid. The plaintiff had the right to tax those costs in the final judgment (*Code of Civil Procedure, sec. 779*).

The judgment should be corrected by striking out the sum of \$123.93 taxed as costs of general term, but without costs of motion.

SUPREME COURT.

ANDERSON DUNN, respondent, agt. EDWARD D. JAMES,
appellant.

Contract — Quantum meruit — Evidence — Memoranda — when admissible — Entry in books — Proof of facts entered — Trial — Questions for a jury.

On a trial before a jury the question as to the admission of a memorandum book, like any memorandum resorted to, to aid or correct the memory, which, without it, would be indefinite and uncertain, is not whether it was admissible as the case stood when it was offered and received, but it may be received with reference to other evidence afterwards to be submitted.

Where the plaintiff swears that he had a memorandum book kept by G. ; that he was unable to keep it; that when money was paid him he took the book to G., who entered it; that he gave the items of money paid him to G. correctly; and the latter swears that he made the entries on the book correctly as the sums were given him:

Held, that this was a verification of the book as a memorandum in aid of the memory, rendering it definite and certain as to the money paid.

Held, also, that this evidence, thus made certain in its effect, is admissible.

Held, further, that where it was proved that the book was drawn off on a paper in the form of an account, and what the book contained was put upon this paper, thus making a sworn transcript of the book, and that this account was furnished to the defendant, and after he had examined it he said, "I find it pretty correct."

Held, that this evidence rendered the book competent as a memorandum, for the defendant had in substance admitted its correctness by admitting the correctness of a verified copy.

Although the evidence of the defendant tended to a contradiction of these admissions, yet in this view the entire evidence, including the book as a verified memorandum, was proper for the consideration of the jury.

Where, upon the close of the case, the plaintiff's counsel suggested that the accounts of the plaintiff, which was the sworn copy of the book

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and the memorandum used by the defendant while testifying, should be delivered to the jury; and the judge stated that if neither party objected they could be so delivered, and no objection being made, the same were handed to the jury:

Held, that this was in effect a consent that the account, which was shown to have been taken correctly from the book, might go before the jury on the occasion of their deliberations, and took away all just ground for the objections that the book was improperly admitted, if any such ground before existed.

Third Department, General Term, December, 1879.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

BOCKES, J. — The action was for work, labor and services, and for money paid, laid out and expended.

The plaintiff established his case for work and labor by his own testimony, and that given by other witnesses tending in some considerable degree in his corroboration. His evidence was disputed by the defendant in several important particulars; but the jury passed on these questions of controverted facts, and found in favor of the plaintiff. It must then be assumed, giving the verdict due significance and force, that the plaintiff labored for the defendant for a long time, and was to have twenty-five dollars per month — four dollars per month for board and one dollar per week for washing. Under this arrangement he earned a large amount, far exceeding the sum awarded him by the jury. The plaintiff testified, as did also the defendant, to various payments; and as the case comes before us on the verdict of the jury as to time of service and arrangement for compensation, the principal question on this appeal is in regard to the sums or amount paid. Indeed, this is here the principal, if not the only question, even if it be conceded that the jury ignored the alleged agreement for compensation testified to by the plaintiff, and based their verdict on a *quantum meruit*.

It may be well here to consider and dispose of another point in the case on which great significance is placed by the defendant's counsel. The defendant held and put in evidence

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a certificate of settlement or receipt given him by the plaintiff at or near the time of the termination of the plaintiff's services. This receipt stated that it was given on compromise of mutual accounts and claims between the parties, and on final settlement between them, and fixed the balance due the plaintiff at \$500. It further acknowledged the payment of \$250 then, leaving a balance of \$250 to be paid within two months thereafter. The integrity of this paper was assailed. It was claimed to have been improperly or fraudulently obtained; that the plaintiff, who was an ignorant and illiterate man, not able to read writing, was not made acquainted with its contents, and that its contents were misrepresented to him. The jury found against its validity. This paper was open to attack for fraud; or as a receipt simply, was subject to explanation, in view of the peculiarity of the paper itself, the singularity of its contents, considered with reference to the matters unsettled and undisputed between the parties, the position of the parties — one an educated professional man, a lawyer, the other an uneducated, ignorant, common laborer, unable to read writing. The express denial of the plaintiff that the paper was truthfully and fully read to him, or its contents fully and truthfully stated, with the corroboration to a great extent given by another witness, made the validity and binding force of the paper a proper subject for consideration and determination by the jury. The question is not one for the court on the evidence. How we should find on the proof is immaterial; it is sufficient for the respondent on this appeal that a case on this point was made for the jury. The court is not at liberty under the facts proved to gainsay the verdict. The alleged defense then, which rested on the integrity of the paper alluded to, is by the verdict put out of the way; nor did this require the restoration of the \$250 paid at the time the paper was given. If the paper was found to be invalid and void the case was left as if it had never existed, and the money then paid would be applied in reduction of the plaintiff's claims.

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The important question on this appeal arises upon the admission of the plaintiff's memorandum book as evidence before the jury. The question is not whether it was admissible as the case stood when it was offered and received, for it may and probably was received with reference to other evidence afterwards to be submitted. This practice in the admission of evidence is often adopted on the trial. Other and further evidence will often overcome an objection well based until such evidence be put in. So the question is whether the book was admissible, as the case was made on all the evidence submitted. It is in this view that the question is presented here for examination. So, too, it must be held in mind that the book was not admitted as a book of accounts, but as a memorandum, like any memorandum resorted to to aid or correct the memory, which without it would be indefinite and uncertain.

There are two ways in which the admission of the book as a memorandum may be justified. It is proved that the book was drawn off on a paper in the form of an account; what the book contained was put upon this paper. Now we have a sworn transcript of the book. This account, as it was called (this transcript being a copy of the book), was furnished to the defendant, and after he had examined it he, as the witness stated, said: "I find it pretty correct." The plaintiff testified that "when he looked over my account he said it was all right." This was the transcript from the book made by Gorman, which the latter swears in substance was so correctly made. The plaintiff says: "I took a bill down to Mr. James of the amount that was then due me; *that was the bill made by Mr. Gorman from the book.*" Now, this evidence rendered the book competent as a memorandum, for the defendant had in substance admitted its correctness by admitting the correctness of a verified copy. True, the evidence of the defendant tended to a contradiction of these admissions, but in this view the entire evidence, including the book as a verified memorandum, was proper for the consideration of the jury.

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Then the admission of the book is seen to have been proper as a memorandum verified by the defendant's admission, in case the evidence on the part of the plaintiff bearing on the question shall be deemed credible. That was for the jury.

Again, the book is verified as a memorandum in so far as entries of payments were made on it, and it was in this regard that it was offered and received independent of the defendant's admission of the correctness of the sworn transcript from it. The plaintiff swears that he had a memorandum book kept by Mr. Gorman; that he was unable to keep it; that when money was paid him he took the book to Gorman, who entered it; that he told Gorman the amount received from the defendant. Gorman swears that he made the entries correctly as he was told. He says, speaking on this point, "I did just as he told me—I put it in this book." This evidence, with some other proof bearing on the subject, was given under the ruling of the court, that the plaintiff might prove the account Gorman kept, and show by this plaintiff, that he gave Gorman a true statement of what he had received and that Gorman kept the account as requested. Now, according to the case here presented, the plaintiff swears, in substance and effect, that he gave the items of moneys paid him to Gorman correctly; and the latter swears that he made the entries on the book correctly, as the sums were given him. This was a verification of the book as a memorandum in aid of the memory, rendering it definite and certain as to the money paid. This evidence, too, thus made certain in its effect, was admissible (*Shiar* agt. *Van Dyke*, 10 *Hun*, 528; *Pugne* agt. *Hodge*, 7 *Hun*, 612). In the last case cited the plaintiff testified that he made entries in accordance with statements made to him by another witness, and the latter testified that such statements were correct. The evidence thus made complete was held to be competent. The book, then, in this view, became competent evidence as a memorandum. Its admission was not error.

And again it appears that at the close of the case the plaintiff's counsel suggested that the accounts of the plaintiff (this

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was the sworn copy of the book), and the memorandum used by the defendant while giving his testimony, should be delivered to the jury; and the judge thereupon stated that if neither party objected the accounts could be so delivered; and no objection being made, the accounts were handed to the jury, who thereupon took them and retired for deliberation. Here was in effect a consent that the account, which was shown to have been taken correctly from the book, might go before the jury on the occasion of their deliberations. This took away all just ground for the objections that the book was improperly admitted, if indeed any such ground before existed.

A motion to set aside the verdict of the jury made on the minutes of the court was made and denied; but it does not appear that any formal order was entered, and there is no formal appeal, as there probably would not be, from that ruling.

The judgment appealed from must be affirmed, with costs.
BOARDMAN, J., concurs.

NOTE. — This judgment was affirmed by the court of appeals on above opinion, June, 1881. [Ed.

Hess agt. Appell.

N. Y. MARINE COURT.

JACOB HESS, TOWNSEND COX and THOMAS S. BRENNAN, commissioners of public charities and correction, agt. JOHN APPELL.

THE SAME agt. THREE HUNDRED AND TWENTY OTHER DEFENDANTS.

Excise law — Requisites of complaint and proofs to entitle party to use the names of commissioners of public charities and corrections in the prosecution of actions for penalties under the act of 1857, chapter 628, section 30 — What is reasonable proof.

These actions were commenced by one R., under section 30 of the act of 1857 (*chap.* 628), which, in substance, provides that in case the overseers of the poor (in this county, the plaintiffs), whose duty it is to prosecute for any penalty incurred under the act to suppress intemperance and to regulate the sale of intoxicating liquors, shall neglect to prosecute for the period of ten days after complaint to them that any provision of said act has been violated, accompanied with reasonable proof of the same, that then any other person may prosecute therefor in their names, claiming that he had complied with the statute and that the commissioners had failed to perform their duty, and that he thereby acquired the right to use their names as plaintiffs. The commissioners base their omission to prosecute upon the insufficiency of the complaint and the proofs which accompanied it. From these proofs it appears that the complainant, who is a resident of Brooklyn, annexed to and made part of his complaint a printed copy of the City Record, containing the names of all the licensed liquor dealers of New York, about 9,000 in number, and all of these persons were charged in a general way with every conceivable violation of the excise act. R., the chief witness, resides in Richmond county, and two other persons named as witnesses are said to reside in the city of New York, but they fail to disclose their occupations, places of business or residence.

Held, that the relator, R., has not brought himself within the statute, that he has neither served the complaint nor furnished the proof required thereby, and that he had no authority to bring any action in the names of the plaintiffs founded on said complaint or proofs.

The complaint filed with the commissioners is not only unreasonable, but impracticable, and does not satisfy the requirements of the statute.

In such case the commissioners have the right to move to discontinue or dismiss the actions.

Special Term, January, 1882.

Hess agt. Appell.

MOTION by the plaintiffs to dismiss the above actions.

William H. Boyd, corporation attorney.

John R. Fellows, for the excise board.

William H. Mundy, for the relator Rillings.

MCADAM, J.— These actions were commenced by one William H. Mundy, as the attorney of one E. M. Rillings, under section 30 of the act of 1857 (*chap.* 628), which in substance provides that in case the overseers of the poor (in this county the plaintiffs), whose duty it is to prosecute for any penalty incurred under the act to suppress intemperance and to regulate the sale of intoxicating liquors, shall neglect to prosecute for the period of ten days after complaint to them that any provision of said act has been violated, accompanied with reasonable proof of the same, that then any other person may prosecute therefor in their names.

Mr. Rillings claims that he complied with this provision of the statute, and that the commissioners, on the other hand, failed to perform their duty in the premises, and that he thereby acquired the right to use their names as plaintiffs in any action he might elect to bring against any of the persons complained of. The commissioners, by this motion, deny that they failed to perform their official duty, or that Rillings acquired any legal right to use their names in the prosecution of said actions, and they therefore ask that the actions be discontinued or dismissed. That they have the right to make such a motion, *see Thayer agt. Lewis* (4 Den., 270); *Board of Commrs. agt. Purdy* (36 Barb. 266); *Town of Lyons agt. Cole* (3 T. & C., 432). The question involved, therefore, resolves itself into the inquiry whether the commissioners received the complaint and proofs contemplated by the statute, and thereafter failed to prosecute the offenders named for the penalties imposed thereby, and whether by such neglect Rillings has succeeded to the right of performing for them

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the responsible duties which he claims they neglected. In dealing with this question, it must be remembered that the commissioners hold a high and responsible office that requires discretion, and a trust which must be exercised intelligently for the public good; that when they bring suit, or in the exercise of their best judgment decline to prosecute, their decision is given under the sanction of their official oath, and is presumptively correct, and the *onus* of proving the contrary is upon him who asserts it. The commissioners base their omission to prosecute upon the insufficiency of the complaint, and the proofs which accompanied it. From these proofs it appears that the complainant, who is a resident of Brooklyn, annexed to and made part of his complaint a printed copy of the city record, containing the names of all the licensed liquor dealers of New York, about 9,000 in number, and all of these persons were charged in a general way with every conceivable violation of the excise act. Rillings, the chief witness, resides in Richmond county, and two other persons named as witnesses are said to reside in the city of New York, but they fail to disclose their occupations, places of business or residence. The sweeping character of the complaint, aimed as it was against all the licensed liquor dealers of the city of New York indiscriminately, accompanied only by vague and indefinite proofs of a general character, made by non-residents and unknown persons, was insufficient under the statute to compel the commissioners to investigate 9,000 charges against 9,000 different individuals, doing business under licenses granted by the board of excise in conformity with the laws of the state, and to commence separate suits on each charge made. To hold that such a drag net, filed on one day, supported by proof of a general but indefinite character, constituted the complaint and proofs which the statute contemplated, would be to decide in effect that, upon receiving from any source what purports to be a complaint with proofs annexed, the commissioners within ten days must, whether the proofs be satisfactory or not, arbitrarily and without exercising their own

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good judgment, prosecute every person the self-appointed complainant sees fit to designate, or in default thereof, delegate to him or to any person who appears in the role of a complainant, the liberty of prosecuting, in the names of the commissioners, any person or persons such complainant may from time to time select from the list presented, and this whether the person complaining is responsible or irresponsible, a resident or non-resident, or whether the complainant is actuated by honest impulses or mercenary motives. Such a decision would not only be unsound, but productive of mischievous results. But the statute permits of no such iniquitous interpretation, for it in terms requires "reasonable proof," and by construction exacts a "reasonable complaint" as well.

The complaint filed with the commissioners is not only unreasonable, but impracticable, and does not satisfy the requirements of the statute, for it not only requires the commissioners to pass upon 900 cases per day, but to bring a like number of suits during each of the ten days allowed by the statute, not excluding Sundays, a thing not only impracticable, but impossible.

Considering the fact that each suit brought would, in all probability, involve an expenditure of \$100, this in the 9,000 cases would aggregate \$900,000. The incurring of such a liability upon the mere complaint or suggestion of an irresponsible non-resident would not only be unjustifiable, but censurable in the extreme, and yet if the construction contended for by the relator is to prevail, all these things might happen; and still he claims that, because the commissioners failed to prosecute within the ten days fixed by the statute, that all the prosecuting powers of the commissioners passed to him, to the extent even of using their names in prosecutions against all or any of the 9,000 persons such complainant might see fit to select, with the power of discontinuing any of said actions when his ends or purposes were satisfied.

The supreme court in 13 Abbott's Practice (*p.* 439) aptly said: "Under this statute the legislature have required the

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party who turns informer and claims to make use of the names of the commissioners of excise as plaintiffs, to produce reasonable proof that the accused party has been guilty." This the complainant has, in my judgment, failed to do, the complaint being so general and the proofs so indefinite that no one person named could be singled out and convicted upon the same. To hold that Rillings, under such circumstances, succeeded to all the prosecuting powers and discretion of sworn public officials in respect to said 9,000 cases would be absurd.

The duties of the office held by the plaintiffs cannot be so easily transferred to or acquired by a stranger. The complainant has not shown enough to allow him to supersede the officials, who are by statute especially charged with the execution of the excise law. Under the circumstances, I hold that the relator Rillings has not brought himself within the statute; that he has neither served the complaint nor furnished the proofs required thereby; that he had no authority to bring any action in the names of the plaintiffs founded on said complaint or proofs; that the complaints herein must be dismissed with costs recoverable by the defendants from E. M. Rillings, the person on whose relation said actions were instituted, and that the plaintiffs be permitted to enter upon this decision similar orders in all other actions pending in this court and founded on the same complaint and proofs.

Onderdonk agt. Ackerman.

SUPREME COURT.

WILLIAM H. ONDERDONK, as sole surviving executor of the last will, &c., of ELIZA MOTT, deceased, and also of the last will, &c., of MARIA M. HOBBY, deceased, agt. WARREN ACKERMAN.

Will — Construction of — Authority of executor under the will to sell and convey real estate — Specific performance.

The plaintiff, as vendor, sues for the specific performance of a contract by defendant for the purchase of real estate sold by plaintiff, as executor of the two estates of Eliza and Maria, daughters of Henry Mott. By Henry Mott's will, his estate, real and personal, was vested in trustees. In distinct clauses, he directed them to "stand seized and possessed of one-third part thereof," upon trust for the use of each of three daughters, "during her natural life," and if she "shall be single and unmarried at her death," then "upon such trust, and for such purposes as she shall or may appoint by her last will." The daughters died without issue, and each were single at her death. Maria, the last survivor, was a widow, and neither of the others had ever married. Eliza and Maria each left a will giving a power of sale to her executors.

Held, that plaintiff, as surviving executor of Eliza and Maria, respectively, had authority to sell this real estate, and by his deed as executor to convey a good title to the purchaser.

Special Term, November, 1881.

James Emott, for plaintiff.

Isaac L. Miller and J. Hervey Ackerman, for defendant.

LAWRENCE, J. — The objections to the title to the property involved in this action, so far as they relate to or arise under the will of Henry Mott, cannot, in my opinion, be sustained.

The power given to each of the daughters of Henry Mott by his will was not a power to create another trust, but a power to dispose absolutely of the fee of the third part, to the interest and income of which each daughter was entitled

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during her lifetime, under the trusts created by his will, and neither of the daughters having had issue, each of them could, under the terms of Henry Mott's will, transfer to her appointee or appointees a good and absolute title to the one-third part of her father's estate in which she was interested. Nor can it be fairly contended that the will of Esther W. Mott was not an execution of the power of disposition vested in her by the terms of the will of Henry Mott.

The Revised Statutes provide that "lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent, that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication" (2 *R. S.* [6th ed.], 1118, sec. 126.)

By reference to the will of Esther W. Mott, it will be seen that the intention of the testatrix was to dispose, after paying all her just debts, &c., "of all the rest, residue and remainder of my (her) estate, both real and personal, of every nature whatsoever and wheresoever."

It would not be possible to employ language more broad and comprehensive, for the purpose of expressing an intention to dispose of every right, title and interest in real and personal estate of which the testator might be possessed, or with which she might be vested at the time of her decease.

On the face of the will I think it quite apparent that it was intended as an execution of the power vested in Esther W. Mott under her father's will; and even under the law which prevailed prior to the adoption of the Revised Statutes, the will would, I think, have been a valid execution of the power (See *White agt. Hicks*, 33 *N. Y.*, 383; *Bolton agt. De Peyster*, 25 *Barb.*, 564). There does not seem to be any force in the objection that there was an illegal suspension of the power of alienation under the will of Henry Mott or under the wills of either of his three daughters. By the will of Henry, the power of alienation was restricted only during the life of each of his daughters as to the one-third part of

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his estate in respect to which such daughter had the power of appointment.

Under the will of Esther, her sisters took an estate which they could absolutely dispose of (2 *Rev. Stat.* [6th ed.], 1103, sec. 35; 2 *Rev. Stat.* [6th ed.], 1104, sec. 44). And I find nothing in the wills of Eliza Mott and Maria M. Hobby which suspends the power of alienation for more than two lives in being at the time the wills took effect. I agree with the learned counsel for the plaintiff in the position taken by him in his brief, that after the death of Eliza Mott there were always persons in being by whom a perfect title to her share could have been conveyed.

Maria M. Hobby and the executors, by uniting with Underhill, or his heirs or representatives, could have conveyed a title to which no valid objection could have been taken. The objection, then, that there is an illegal suspension of the power of alienation under any of these wills is untenable. It is claimed, however, that as the power of sale contained in the will of Eliza Mott was not exercised within three years from the proof of the will, it is gone by lapse of time, and that the surviving executor has therefore no authority to sell. An examination of the will of Eliza Mott shows conclusively, to my mind, that a sale of her real estate was necessary to accomplish the purpose which she had in view. I understand it to be conceded that her personal estate was entirely inadequate for the payment of the bequests contained in her will, and the devise to Underhill was expressly made subject to the payment of such bequests. It appears quite obvious, then, that there was an equitable conversion of her real estate into personal estate at the time her will became effectual (*Horton* agt. *McCoy*, 47 *N. Y.*, 21; *Bogert* agt. *Hertell*, 4 *Hill*, 492).

During the lifetime of Mrs. Maria Hobby, the power vested in the executors to sell was dependent on her consent. As that power was not executed during Mrs. Hobby's lifetime, I think the presumption must be that she declined to give such consent. Should the power of sale fail because she withheld

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or omitted to give such consent, and it therefore became impossible for the executors to execute the power within three years from the proof of Eliza's will? I think not.

This will is to be construed as a whole, and all the parts are to be made to harmonize, if possible. By putting it in the power of her sister Maria to delay the execution of the power beyond three years from the proof of her will, it is not reasonable to suppose that Eliza intended to defeat the whole scope and frame-work of her will. Such a construction of the will would be, in my opinion, opposed to familiar principles (*Taggart* agt. *Murray*, 53 *N. Y.*, 233, and cases cited; *Vernon* agt. *Vernon*, 53 *N. Y.*, 351; *Van Vechten* agt. *Keator*, 63 *N. Y.*, 52; *Kinnier* agt. *Rogers*, 42 *N. Y.*, 531; *Wild* agt. *Bergen*, 16 *Hun*, 127).

With respect to the objection that the heirs of Henry Mott and the heirs of Underhill should have been made parties to this action, I deem it sufficient to say that it does not appear, from the view which I have taken of the case, that the heirs of Henry Mott have any interest in the controversy. And in relation to the heirs of Underhill, it was shown that they had executed releases, which were proven upon the trial and tendered to the defendant. Even then, if this objection ever had any force, it is removed by the execution of the releases, and the rule is well settled that if, at the time of the trial, the vendor can make a good title, he is entitled to a decree of specific performance (*Jenkins* agt. *Fahey*, 73 *N. Y.*, 355; *Pierce* agt. *Nichols*, 1 *Paige*, 244; *Brown* agt. *Haff*, 5 *Paige*, 235). But I do not think that the heirs of Underhill were necessary parties to this action.

If I am correct in the views above expressed there was an equitable conversion of Eliza's estate, and the devise to Underhill was made subject to the payment of the legacies mentioned in her will. His interest in her estate was in the proceeds arising from its sale after the payment of the legacies, and that is the interest which has devolved upon his representatives. The purchaser from the executor assuming the power

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of sale to exist is not bound to see that the proceeds of the sale are distributed to the parties entitled to them. It can, therefore, be of no consequence to the defendant in this action whether the representatives of Underhill are before the court or not.

The devise to Underhill by the will of Maria M. Hobby lapsed by his death before her, and as I read the codicil the bequest to him was revoked.

The observations which have been made in respect to the general features of the will of Eliza Mott are equally applicable to the will of her sister Maria, but as the power of sale was executed within three years from the proof of Maria's will, and no question is raised in respect thereto, it is unnecessary to comment further upon the latter's will.

There is nothing in the case of *Jordan agt. Poillon* (77 *N. Y.*, 518) which conflicts with the position asserted by the plaintiff in this case. It is conceded that a purchaser has a right to require a good title, and that he will not be compelled to complete his purchase and accept a deed which leaves him to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which will seriously affect the value of the property. I also agree with the plaintiff's counsel that that case does not apply, for the reason that the objections here are all matters of law, and from my investigation of the case, I have come to the determination that the title is not bad, but good, as matter of law. If the objections urged are not good in law they are not objections affecting the validity of the title in any legal sense, and they afford no excuse to the purchaser for refusing to complete his contract. The case of *McCahill agt. Hamilton* (20 *Hun*, 388) is inapplicable for the same reasons.

Finally, I am of the opinion that the sale by the plaintiff, under the wills of Eliza Mott and Maria M. Hobby, was a lawful execution of the power vested in him, and that he is entitled to a decree requiring a specific performance of his contract by the defendant. The findings may be settled on three days' notice.

Goff agt. Nolan.

SUPREME COURT.

JOHN GOFF and others agt. MICHAEL NOLAN, individually,
and as mayor of the city of Albany.

Municipal corporation — agreement by — Their power as to widening public streets — Court no power to review discretion of common council — common council's sole right to decide questions of parliamentary law — what interest of member not sufficient to make his vote void.

No valid agreement can be made by the official representative of a municipal corporation which will, on a measure of public policy, bind their successors.

A common council has the sole right to decide all questions of parliamentary law.

A motion for a reconsideration of a vote upon the passage of a resolution, after a declaration by the presiding officer that it was lost, does not invalidate the vote taken upon it. If the resolution has been lost it is competent for the body to introduce it anew and pass it, and the mode, therefore, of changing their first action is entirely within their control.

The supreme court has no power to review the discretion of a common council as to the necessity of widening a street, and taking the property of an individual for that purpose.

That a certain alderman would be benefited, together with the general public, by the widening of a certain street, does not make his vote as to such widening void.

Ulster Special Term, August, 1881.

MOTION by plaintiffs for an injunction to prevent the widening of Bleecker street in the city of Albany.

William H. King, for plaintiff.

Albert Hessberg, for defendant.

WESTBROOK, J. — Without any elaboration the conclusions reached will be stated.

First. As to the alleged agreement with the corporation of the city of Albany that the property to be taken should remain a park, it is answered :

1st. That there is no evidence of any such agreement made with the corporation as such.

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2d. No valid agreement can be made by the official representative of a municipal corporation which will, on a measure of public policy, bind their successors (*Dillon on Municipal Corporations* [3d ed.], secs. 445, 455, 457; *People* agt. *The Long Island Railroad Company and ano.*, 60 *How.*, 395, 408, 409, 412, 413; *Newton and ors.* agt. *Commissioners of Mahoning*, 10 *Otto*, 548).

Second. As to the objection made to Alderman Murphy's moving for a reconsideration of the vote upon the passage of the resolution to widen the street, after, as the plaintiffs allege, the same had been declared lost, it is clear:

1st. That such motion was made prior to the declaration of the result of the vote.

2d. If made after a declaration by the presiding officer that it was lost, it would not have invalidated the vote taken upon it. The question raised is one of parliamentary law, which the common council had the sole right to decide. If the resolution had been lost, it was competent for that body to introduce it anew, and pass it, and the mode, therefore, of changing the first action was entirely within their control (*People* agt. *Common Council of Rochester*, 5 *Lans.*, 11; *Commonwealth* agt. *Lancaster*, 5 *Watts*, 152).

Third. This court has no power to review the discretion of the common council as to the necessity of widening the street and taking the property of the plaintiffs for that purpose (*People* agt. *Smith*, 21 *N. Y.*, 595; *Brooklyn Park Commissioners* agt. *Armstrong*, 45 *N. Y.*, 234; *In Matter of Fowler*, 53 *N. Y.*, 60; *Matter of Deansville Cemetery Association*, 66 *N. Y.*, 596).

Fourth. Alderman Carey was not interested so as to make his vote void.

None of his property was taken. That which is proposed to be taken is between his lot and Bleecker street, and the effect of the widening will be simply to give him a frontage on said Bleecker street, and whether that will be a benefit to him or not is, at least, under the proof submitted, doubtful.

Mutual Life Insurance Company agt. Terry.

The question was simply a legislative one, whether the public interests required the widening of the street. The passage of the resolution would not enable Carey to sell any property of his to the city, and with the compensation to the owners of the property taken, and its mode of payment, he has nothing to do.

If the widening of Bleeker street be really a public improvement, then every alderman voting for it was more or less benefited, and if the argument urged against the vote of Carey is sound, it can be made against every one cast. No adjudged case, which I have been able to find, sustains the objection, and if the principle upon which it rests be correct, it would be difficult to say how much of federal and state legislation, as well as that of villages and cities, would be nullified (*Steckert agt. The City of East Saginaw*, 22 Mich., 104).

Fifth. The proof submitted by the defendants is ample to show that Alderman McCormick was present, and that the resolution was adopted by a legal vote.

Sixth. The motion for the injunction must be denied, with costs.

SUPREME COURT.

THE MUTUAL LIFE INSURANCE COMPANY agt. ELEANOR J. TERRY and ABRAHAM S. JACKSON.

Insurance (Life)—Policy for use of wife non-assignable—Policy changed to paid-up policy does not change its character—Transfer though made in another state not valid here.

A life policy which, as originally issued, was declared to be for the use of the wife of the insured, is not changed in its character by being afterward changed to a "paid-up" policy; and being non-assignable under the laws of the state during the life of the insured, any transfer of the widow's interest in it, though made in another state, could not be deemed valid here.

Special Term, January, 1882.

Mutual Life Insurance Company agt. Terry.

LARREMORE, J.—The policy as originally issued was declared to be for the sole use of Eleanor J. Terry, in conformity with the statute in such case made and provided. In case of her death during the life of the insured, the amount of the insurance was made payable to her children, or to their guardian if under age. The indorsement upon it by which it became a “paid-up” policy did not change its character or effect. It still remained what the law has declared it to be—a contract made with an eye to the provisions of the act of April 1, 1840 (*Laws of 1840, chap. 80*), and the acts amendatory thereof, which were intended to provide for a state of widowhood and orphanage. By the law of this state, such a policy is non-assignable during the life of the insured (*Eadie agt. Simon*, 26 *N. Y.*, 9; *Barry agt. Equitable Life Ins. Co.*, 59 *N. Y.*, 587; *Wilson agt. Lawrence*, 13 *Hun*, 238; 76 *N. Y.*, 585; *Brummer agt. Cohn, Ct. of App.*, October, 1881; *reported ante*, 171.)

As was said by chief justice FOLGER (59 *N. Y.*, 587), “the contract was made here, is payable here, and this action is here.” At the time of the alleged assignment of the policy by Mrs. Terry, it had not become realized personal property and was therefore unassignable. Such being the fact, any transfer of her interest in it, though made in another state, could not be deemed valid here (see authorities above cited).

Judgment must be rendered in favor of Mrs. Terry; but in view of all the facts of the case the defendant Jackson should not be mulcted in costs. He appears to have acted under the belief that he had a rightful claim to the property in dispute, and ought to reimburse himself for actual advances upon its credit. It is not denied that advances were made to her by him, and as Mrs. Terry will now receive the insurance moneys as realized assets, and has made no offer of repayment of the sums borrowed, it is not just that Jackson should suffer further loss on her account.

Erisman agt. Pidcock.

SUPREME COURT.

HENRY ERISMAN agt. JAMES W. PIDCOCK.

Removal of cause — Order may be made without notice, and at a special term other than in the county where the venue is laid — Bond — Special Bail — After order is entered, state court no power to proceed — Code of Civil Procedure, section 769.

Where in an action triable in Erie county, an order for its removal into the circuit of the United States, under the law of congress of 1875, was made on November 11, 1880, in the county of New York, without notice, and two days later an order was granted in Erie county, referring the action and appointing a receiver:

Held, that under the construction which has been given to this act of congress, the application for the order of removal was regular, even though no notice of it was given to the attorneys of the plaintiff.

As it was regularly made without a service of notice, the order could be properly made, as it was, by a special term other than in the county where the venue was laid.

It is only when special bail is originally requisite in the action that the bond executed is required to include a condition for the entering of such bail.

After the order had been entered in Erie county and served, the court had no authority to proceed further in the action.

The order afterwards made for a reference and receiver was entirely unauthorized, and though void, a motion to vacate it was proper.

Erie, Special Term, November, 1881.

MOTION made by defendant to vacate an order referring the issues in this action to a referee, and appointing a receiver.

A. G. Rice, for plaintiff.

Geo. F. Martens, for defendant.

DANIELS, *J.* — Before the order was made, which it is now insisted in support of the motion should be vacated, an order was made in form removing this cause into the circuit court of the United States. That order was served upon the attorneys for the plaintiff on the 11th day of November, 1880, while the order referring the action and appointing the

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receiver was not made until the thirteenth day of the same month. This order for the removal of the action was made under chapter 137 of the laws of congress, enacted in 1875 (*Supplement to United States Statutes*, 174, *secs.* 2, 3). The county designated in the complaint for the trial of the action was the county of Erie, while the order for its removal to the circuit court was made in the county of New York. For that reason it was considered to be unauthorized and ineffectual for the removal of the action. But as the law stood at the time when the application was made, it was only such motions as were to be upon notice that were required to be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable (*Code Civil Procedure*, *sec.* 769).

Where notice is not required to be given, there the application is not within the terms of the restraint created by this section, and it may be made elsewhere, for the special term, when not restrained by statutory provisions, may hear and dispose of applications for orders in the course of legal proceedings, wherever it may at the time be held. The jurisdiction in such a case is necessarily of a general character, and not restricted to the district in which the court may be held. This follows from the nature of the court itself, which is authorized to exercise the authority of the supreme court of the state; and this conclusion has, to a certain extent, been sanctioned by the cases of *Rice* agt. *Ehle* (65 *Barb.*, 185); *Tracy* agt. *Tallmadge* (1 *Abb.*, 463); *Wales* agt. *Jones* (2 *Abb.*, 20).

By the constitution of the United States, congress has, by clear implication, been vested with authority to provide for the mode in which actions may be removed from the state courts to the courts of the United States (*Const. U. S.*, *art.* 3, *sec.* 2, *sub.* 2; *art.* 1, *sec.* 17). And that authority has been so exercised as to prescribe the mode of proceeding by which the object is to be obtained. That has always been considered to be within the peculiar province of congress over this

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subject, and in the act now under consideration it has been declared in clear terms what it shall be necessary to do to remove an action in the cases mentioned in it from the state courts into the United States circuit court.

That the present action is one of those included within the terms of this act of congress is clearly disclosed by the papers, and the proceedings taken to secure its removal conform to what the act has required to be done, unless notice of the application should have been given and the condition of the bond filed should have been made broader than it was in its terms. The act of congress has not been framed in such terms as to require notice of the application to be given, but by implication it has, in substance, dispensed with the observance of that formality, for it has otherwise prescribed the proceedings required to be taken, and upon the observance of those requirements it has been made the duty of the state court to accept the petition and the bond, and proceed no further in the suit. This is all that has been required to be done to secure the removal of the action (*Sec. 3, chap. 137, U. S. Statutes, 1875*).

By numerating precisely the steps required to be taken, and declaring the effect of a compliance to that extent with the provisions of the law, the obligation to give notice of the application is by implication excluded, and that has been the construction given to another preceding similar provision upon this subject (*Fiske agt. Union Pacific R. R. Co., 8 Blatch., 243; Dillon on Removal of Causes [3d ed.], 92, note 2*).

The more commendable practice would be to give notice of the application, and in that manner avoid all possibility for future dissensions and misunderstandings (*Chamberlain agt. American, &c., Trust Co., 11 Hun., 370*).

Still, under this construction of the act of congress, the application for the order must be held to have been regular, even though no notice was given of it to the attorneys of the plaintiff.

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And as it was regularly made without the service of notice, the order could be properly made, as it was, by the special term in session in the county of New York.

The bond was not conditioned for the entering of special bail by the defendant. But as this action appears by the pleading and proceedings to have been one in which bail could not be required, a compliance with that portion of the act of congress was unnecessary; for by the fair import of its terms, it is only when special bail is originally requisite in the action that the bond executed is required to include this obligation.

The order which was made directed that it should be entered in Erie county, and that direction appears to have been complied with, and the papers upon which it was made have been filed there.

This complied with the requirements made by rule 2 of the general rules of the supreme court, and rendered the proceedings regular as they were taken for the removal of the cause. After the order had been entered and served, this court, under the restraints imposed upon it by the act of congress, had no authority to proceed further in the action. Its powers over it for the time being were entirely at an end (*Insurance Co. agt. Dunn*, 19 *Wall.*, 214; *Kern agt. Hindekossner*, 103 *U. S. Rep.*, 485; *Bell agt. Dix*, 49 *N. Y.*, 232). The order, consequently, which was afterwards made by this court directing the action to be tried before a referee and appointing a receiver therein was entirely unauthorized, and as that was its character, a motion was a very proper proceeding, even though it was void, to vacate and set it aside (*Kamp agt. Kamp*, 59 *N. Y.*, 212, 216-217). An order must, therefore, be entered directing the order of reference and for the appointment of a receiver to be vacated, but, under the circumstances appearing in the case, it should be without costs.

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SUPREME COURT.

FITZGERALD agt. QUANN, impleaded with MARY his wife.

Married women — actions against — Joinder of husband with wife in action for wife's tort, improper — Code of Civil Procedure, section 450.

Under section 450 of the Code of Civil Procedure in an action against a married woman for her personal tort, it is not necessary to join her husband as a defendant, and he is not a proper party to such an action. Where on a motion for a new trial by one of the defendants, it appeared, as a question of law, that there could be no recovery as against such defendant, and that a new trial would not change the result:

Held, that the verdict should be set aside, and a nonsuit directed as to such defendant.

At Circuit, May, 1881.

MOTION by Charles Q. Quann, one of the defendants, for a new trial on the minutes.

The action was brought to recover damages for a slander uttered by the wife of Quann, and he was joined with her as defendant.

The jury returned a general verdict in favor of the plaintiff. The facts are fully stated in the opinion.

James Wood, for motion.

S. Hubbard, opposed.

RUMSEY, J. — The point is strongly urged upon me, that having denied the motion for a nonsuit at the trial, upon the authority of another judge at the circuit, I should continue to follow that decision and deny this motion, without further examination. I should be glad if this were so; but as the object of allowing motions for a new trial to be made upon the minutes is to afford a cheap and speedy review of rulings at the circuit, that they may be corrected if wrong, I feel compelled to examine this question upon the merits.

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The defendant Mary L. Quann is the wife of the defendant Charles Q. Quann. She uttered a slander against plaintiff. The plaintiff sues for damages and joins the husband as a defendant. The husband moves for a nonsuit upon the ground that he is not a proper party defendant in an action for his wife's separate torts. The precise question presented is whether, under section 450 of the Code of Civil Procedure, the husband can be joined as defendant with his wife in an action for her separate personal tort.

Until the Code of Civil Procedure took effect, the husband must be joined as a defendant with her in an action for the mere personal torts of his wife, so long as the relation of husband and wife continued.

An inquiry into the reason of this rule may throw light upon the question we are examining. The necessity of such joinder was not because he was liable. Mr. Bishop, in his learned work on *The Law of Married Women*, in speaking of this subject uses the following language: "It is not true, speaking accurately and scientifically, that the husband is liable for the torts of his wife. For example, she commits a tort, and then dies before suit brought, he cannot be sued for it, and is in no way responsible; on the other hand, if he dies, she may then be sued alone, the same as though she had been discovered when the tort was committed. If during their joint lives an action is brought against the two, and he dies pending suit, the action survives against the wife. The liability, therefore, of the husband for the wife's torts grows merely out of the fact that, by the rules of the common law, a suit cannot be maintained against a wife alone during coverture; and, if the two could not be sued together, the party suffering the injury would be without remedy" (*Bishop on Married Women*, sec. 254).

The cases cited by Mr. Bishop fully sustain him in writing as he has, and the same rule and reason are laid down elsewhere (*Cooley on Torts*, 115; *Capel agt. Powell*, 17 C. B. [N. S.], 743). In the last case, the court held that one who

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had obtained a divorce was not thereafter a proper party defendant in an action for the tort of the wife committed during coverture.

EARL, Ch. J., says: "It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; he is joined only by reason of the universal rule that the wife, during coverture, cannot be either a sole plaintiff or a sole defendant" (*Page* 748; *Konig agt. Manly*, 49 *N. Y.*, 192, 201). The Code of Procedure (*sec.* 114) changed the rule to some extent, and the married women's acts of 1860-1862 changed it still more. And it is noticeable that this change was made by permitting her to sue or to be sued alone, the courts thus conceding that when the necessity of joining her husband as a party ceased, there was no longer any question of his liability. But so far as the joinder of the husband as defendant was concerned, these statutes applied only to actions relating to her separate property, and did not affect actions for her personal torts.

Having ascertained the reason of the rule that husband and wife must be joined in such an action, let us see what the Code of Civil Procedure says about it. Section 450, as originally enacted, reads: "In an action * * * a married woman appears, prosecutes and defends alone * * * as if she was single." That section eliminated the element of coverture from all actions. It put the wife in all respects, as regards actions, on the footing of a single woman, precisely as it says it does. It took away the formal requirement of the joinder of the husband in any action.

The reason of the rule which made him a defendant was thus taken away, and so, I think, logically, the rule itself ceased to exist. It will be noticed that the section appears in that part of the Code which prescribes who shall be parties to actions, and, as originally enacted, it applied to every action and excepted none. I am quite clear that the original section forbade the joinder of the husband in any case where he would not have been a proper party if there had been no

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marriage. It was so held by judge DWIGHT upon the construction of that section, without reference to the amendment, at the Steuben circuit, in *Havens* agt. *Gregg*, where he ordered a nonsuit as to the husband in an action for the wife's slander, upon the ground that under section 450 he was no longer a proper party (*See also*, 2 *Bishop on Married Women*, secs. 266, 267). The intention of that section was, as Mr. Throop says, to sweep away all distinctions between a *feme-sole* and a *feme-covert*, in respect of being sued, and this court has held, in the first department, that the language was comprehensive enough to do it (*Janinski* agt. *Heidelberg*, 21 *Hun*, 439).

But it is urged that by the amendment of 1879 (*Laws of 1879, chap. 542, p. 617*), the legislature have restored the old rule, and when they enacted that "it was not necessary or proper to join her husband with her as a party in an action affecting her separate property," they by necessary implication declared that it was necessary to join him in every other action. I do not think so. The question is, what was the intention of the legislature? The intention is to be found in the statute itself (*Sedgw. on Stat. and Cons. Law*, 243, 244). The legislature had passed an act which was general in its terms, and applied to all actions and special proceedings, and in that act it laid down a rule which included all actions to which a married woman was a party. The amendment does not expressly conflict with this rule, nor does it lay down a different rule for such actions than is laid down in the original act. It applies to a portion of the actions which the first sentence also refers to. If the legislature had intended to change, as to other classes of actions, the rule laid down in the first sentence, there was an easy and obvious way to do it. As it has not even referred to them, I think the fair construction of the section is that it intended the first sentence of the section to apply to all actions as it does in terms, and for greater caution to specify one class of actions in the second sentence, so that, as to them, there could be no possible misunderstanding of the legislative intent. The statute is clearly

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intended to apply to all cases, and, therefore, the maxim *expressio unius est exclusio alterius* does not apply (*Bloom's Leg. Max.*, 515, m. p.).

The conclusion I have reached is that, since the Code of Civil Procedure, a husband is not a proper party. I am cited by plaintiff's counsel to two cases said to have been decided in New York county adversely to this view; but I have been unable to find any report of them, and I can hardly think they are in point on this question, which has been so extensively mooted during the last three years, or they would have been reported. *

The verdict against Quann must be set aside, but in the view I have taken of the law there can be no recovery against him, and no new trial would change the result. Under those circumstances the proper order would be to set aside the verdict as to Quann, and as to him to direct a nonsuit (*Hall agt.*

* It is believed that the cases referred to above are *Hoffman agt. Lachman* (decided by judge MCADAM at a special term of the N. Y. marine court, March, 1878), and *Berrien agt. Steel* (decided by judge VAN BRUNT at a special term of the supreme court, first department, May, 1878). The first was a demurrer to the complaint by the defendant Sussman Lachman, on the ground that it did not state facts sufficient to constitute a cause of action against him.

The action was brought against Hannah Lachman, the wife of Sussman Lachman, and the said Sussman Lachman, for a slander uttered by the wife, the husband having been joined on the ground of his liability for his wife's personal torts. An order of arrest had been issued in the action against the defendant Sussman Lachman, and a motion to vacate such order, based on the non-liability of the husband for the mere personal torts of the wife under the Code of Civil Procedure, was heard at the same time and was denied. MCADAM, J., said: "The new Code has not changed the common-law liability of the husband for torts committed by the wife (2 *E. D. Smith*, 90; 15 *Abb. Pr.*, 421; and see note to 16 *English Reports*, p. 232, *Moak's notes*). Demurrer overruled.

The second was a demurrer to the complaint by the defendant John G. Steel, on the ground that it did not state facts sufficient to constitute a cause of action against him. The action was brought against Josephene H. Steel, the wife of John G. Steel, and her husband John G. Steel, to recover the value of certain articles of personal property, diamonds, rings, &c., belonging to the plaintiff's testator, and alleged to have been con-

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Hall, 81 *N. Y.*, 131-139; *affirming S. C.*, 13 *Hun*, 306). As the jury were instructed in this case, the plaintiff was entitled to a verdict against both defendants, and the only question presented to them was that of damages. The case is substantially like the one last cited, and I shall make the order which was there held proper, but I shall give no costs of the motion.

Ordered, that verdict as to Quann be set aside, and a nonsuit ordered as to him, without costs of this motion.

SUPREME COURT.

CATHARINE HANCOX agt. SAMUEL M. MEEKER, as sole surviving executor, &c., and others.

Will — Trustee to sell land and invest proceeds — Discretion of trustees as to time to sell and invest.

The testator, by a clause of his will, directs his executors, after paying certain debts and charges, to divide the residue of his estate into eight equal shares, and invest the same separately each of eight children to have the income of one share for life, the principal sum, upon the death of each child, to go to his or her issue; and in the closing part of the clause the executors are authorized to lease the real estate, and

verted by the said Josephene H. Steel to her own use, the husband being joined as a defendant on the ground of his liability for the personal torts of his wife."

VAN BRUNT, J., said: "In the case of *Baum* agt *Mullen* (47 *N. Y.*, 578), the court held that the statute has not altered the common-law liability of the husband for the mere personal torts of the wife, but the rule is changed only when such torts are committed under management and control of her separate property. The same rule was recognized in the case of *Koning* agt. *Manly* (49 *N. Y.*, 192 [200]), where the court admits that, if a married woman is alone guilty of a conversion, the husband is a necessary party. There is no allegation in the complaint tending to show that the tort complained of was committed by Josephene H. Steel in the management of, or in reference to her separate property. Unless this appears, then the common-law liability of the husband still prevails. Demurrer overruled.

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after the death of his wife to sell and convey the same for such prices and upon such terms as they might deem best for the interests of his estate. In an action by one of the children, after the death of the widow, against the sole surviving executor, to compel him to make the division or sale and investment provided for in the will:

Held (overruling demurrer to complaint), that the selection of a proper time for the execution of the trust is not within the discretion of the executor; that the trust to divide, invest and sell constitute an equitable conversion of the realty into personalty from the death of the widow; and the trustee should at that time, in the execution of the trust, get the best prices in the disposition of the realty, and that will meet the exigencies of the will.

Special Term, November, 1881.

DEMURRER to complaint.

Theodore F. Jackson, for demurrer.

George F. Betts, opposed.

VAN VORST, *J.* — All the testator's estate, real and personal, was devised and bequeathed to his executors upon trusts which are clearly defined. The question presented by the demurrer arises under the sixth clause of the will.

By the terms of the trust therein declared, the executors, after having made provision for the debts, legacies, taxes and charges, which the will directed should be paid, were instructed to divide the residue of the estate into eight equal parts or shares, and invest the same separately on bond and mortgage, or in United States government or state securities, the income from which separate shares they were to apply to the use of the testator's eight children for life, each child to be entitled to the income arising from one of such eight parts.

Upon the death of each child his issue was to take the principal sum of such eighth part, the income whereof had been given to the parent.

Among the charges imposed upon his estate by the testator, and which his executors and trustees had been directed to,

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pay, was a bequest to his wife of \$12,000 per annum, and she was also to have the use and occupancy of the testator's homestead on Fifth avenue for life.

The debts and charges have all been paid, and the testator's widow died on the 15th day of May, 1878.

All impediments, therefore, in the way of consummating the principal intention of the testator, with respect to a division and investment of his estate, have been removed, and the trust in this regard should now be executed, unless some other part of the will limits the duty of the trustees in this direction, or clothes them with a discretion which is not contained in the devise and direction referred to above.

The complaint alleges that the defendant, who is the sole surviving executor and trustee under the will, has been requested to make the division or sale and investment provided for in the will, but has hitherto wrongfully neglected to do so, to the injury of the plaintiff, who was a daughter of the testator, and is entitled to the income of one of the shares for life.

It is claimed on the behalf of the executor and trustee, who demurs to the complaint, that the selection of a proper time for the execution of this trust, with respect to a division, sale and investment of the residuary estate into shares, is within his discretion, and that under the allegations of the complaint he cannot be hastened, and that it is not alleged that his refusal to act in this direction is capricious, arbitrary or unreasonable.

From what has been already stated, the exercise of a discretion by the executor and trustee as to the period for a division and conversion, would be inconsistent with the positive directions of the will, which itself fixes a time, based upon facts and conditions which have occurred and been fulfilled.

Reference is, however, made by the learned counsel for the defendant executor to the closing part of the sixth clause of the will, by the terms of which the testator authorized and empowered his executors to let or lease his real estate, to

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receive the rents and profits thereof, and after the decease of his wife, to sell and convey the same for such prices and upon such terms as they might deem best for the interests of his estate.

This clause of the will must be read in connection with the terms in which the principal trust was created, and which it was doubtless designed to aid, and as the last expression of the testator it is entitled to careful consideration.

The power to lease the real estate is not necessarily inconsistent with the direction to divide and invest the principal, because it might be well executed so long as the testator's widow should live.

The death of the wife would, however, in this view, terminate such power, and would make completely operative the trust to divide and invest, and for such purpose to sell.

By the terms of the will the imperative trust to divide, invest and sell, constitute an equitable conversion of the realty into personalty from the death of the widow, and clearly show that as such conversion is necessary to secure perfect equality in the shares, so, too, it makes plain that it was the intention of the testator that such conversion should actually take place upon the death of his wife.

It is true the trustees were to sell and convey for such prices and upon such terms as they might deem best for the interests of the estate. Such limitation clearly means for the best prices and terms which could be obtained at the time the division, sale and investment was directed to be made. This limitation must be reasonably interpreted. And there is no presumption that such prices and terms may not now, considering the lapse of time since the death of the widow, be secured. The trustee should now, in the execution of the trust, get the best prices and secure the most favorable terms in the disposition of the realty, and that will meet the exigencies of the will and amply protect him. The manifest intention of the testator to secure proper and specific investments for his children, through the division and sale of his

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estate, cannot be defeated by an unwillingness on the part of the executor and trustee to accept the best prices and terms which could be secured when the division and investment was directed to be made.

If any facts, however, exist which do not now appear to justify the refusal of the executor and trustee to execute this trust, at this time, they should be set up by way of answer.

There should be judgment for the plaintiff on the demurrer, with liberty to the defendants to answer upon payment of costs.

SUPREME COURT.

LAW agt. McDONALD.

Unlawful acts — When successive actions for cannot be maintained — When action barred by former recoveries.

A plaintiff can have but one suit growing out of a single cause of damages, and after a recovery in an action for an injurious act no action can be maintained on account of any further consequences occasioned by that act. Damages for a single wrongful act can be awarded but once, and in one suit only. When sued for such wrongful act the plaintiff may recover his damages caused thereby, both past and prospective; that is, he takes his equivalent for the entire injury in damages. He cannot split up his damages and have separate and independent recoveries.

A judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings upon which it is rendered, whether the suit embraces the whole or any part of the demand constituting the cause of action. An entire claim arising, either upon a contract or from a wrong, cannot be divided and made the subject of several suits, and if several suits be brought for different parts of such claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits.

Where A. had recovered against B. in his former actions the damages to which he was entitled for all unlawful acts committed by him against A.'s rights prior to October 15, 1875, which acts were the removal of and injury to A.'s pipe leading from a spring to his dwelling and out-

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houses, and the consequent interruption of the flow of water through it to his premises; and, by the judgment in the first action, he was awarded a perpetual injunction against B., restraining the latter from in any way interfering with such pipe. Prior to the recovery in the former actions, and in 1872, A. attempted to replace and repair the pipe, and was prevented from so doing by B., but no such attempt was thereafter repeated until in the spring of 1877, when no opposition was offered; nor did the defendant since 1872 at any time or in any way interfere with the plaintiff's rights as they were ultimately established by the judgment of the court in those suits. The second action was commenced October 15, 1875. In a third suit brought by A. a judgment was awarded against B. for damages which occurred between October 15, 1875, and the 1st day of May, 1877, by reason of the defendant's wrongful act in removing the pipe from the spring and preventing A. from repairing the pipe:

Held, that such recovery could not be sustained. These causes of damage, and each of them, were especially commented on in the former actions, and damages were awarded in both suits. Those recoveries must be presumed to embrace all damages to which the plaintiff was entitled growing out of those wrongful acts, past and prospective, and the present recovery is barred by the former.

Third Department, General Term, September, 1881.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

BOCKES, J. — The plaintiff had recovered against the defendant in the two former actions the damages to which he was entitled for all unlawful acts committed by him against the plaintiff's rights prior to October 15, 1875.

Those acts were the removal of and injury to the plaintiff's pipe leading from the spring to his dwelling and outhouses, and the consequent interruption of the flow of water through it to his premises; and, by the judgment in the first action, he was awarded a perpetual injunction against the defendant, restraining the latter from in any way interfering with such pipe. There is no proof in the case, nor do we understand that it is pretended, that the defendant, after October 15, 1875, ever in any way interfered with the pipe or with the flow of water through it, or, by threats or otherwise, prevented the plaintiff from maintaining it in proper place or

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in repair. It appears that prior to the recovery in the former actions, and in 1872, the plaintiff attempted to replace and repair the pipe, and was prevented from so doing by the defendant, but no such attempt was thereafter repeated until in the spring of 1877, when no opposition was offered; nor did the defendant thereafter (1872), at any time or in any way, interfere with the plaintiff's rights as they were ultimately established by the judgment of the court in those suits. The second action was commenced October 15, 1875. Thus it seems that all right of action against the defendant for everything wrongfully done or suffered by him relating to the subject-matter of plaintiff's complaint in the present (third) action occurred during the time covered by the former suits. If so the recoveries in those actions barred the present claim, for the plaintiff recovered, or should have recovered, his entire damages in those suits, and this would be so whatever might be the form of action. The rule of law applicable to the case would be the same whether the actions were in trespass, or what were formerly denominated actions on the case. The wrongful acts complained of occurred long prior to October 15, 1875; they were not repeated or continued after that time. The recovery in this (third) action seems to have been based on the idea that the defendant was under obligation to maintain the pipe in good repair. But he was not so obligated. The extent of his obligation was to *permit the plaintiff to enjoy his easement*; that is, to lay and retain the pipe in place, keep it in repair and take the water through it from the spring. In the exercise of this right he had been interrupted prior to October 15, 1875, and for such interruption damages had been awarded him in the former suits. But there was no interruption or interference with the right by the defendant subsequent to October 15, 1875, the time covered by the third and last suit. The case is not like that of a continuing nuisance, hence the authorities cited by the respondent's counsel are not in point. The defendant did not disturb the pipe or the flow of water through it after October 15,

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1875, nor did he thereafter prevent the plaintiff from maintaining the pipe in place and in proper repair. The case, in principle, as regards the subject under examination, is not unlike *Porter* agt. *Cobb* (22 *Hun*, 278). After October fifteenth the defendant did nothing to produce the injury complained of, and, as above stated, for all wrongful acts by the defendant prior to that time, damages had been awarded against him. The plaintiff could have but one suit growing out of a single cause of damage. This was held in *Johnson* agt. *Long* (1 *Ld. Ray.*, 370). And in *Fitter* agt. *Beal* (1 *Ld. Ray.*, 339) it was held that after a recovery in an action for an injurious act, no action can be maintained on account of any further consequences occasioned by that act. The authorities are clearly and indisputably to the effect that damages for a single wrongful act can be awarded but once, and in one suit only. When sued for such wrongful act the plaintiff may recover his damages caused thereby, both past and prospective; that is, he takes his equivalent for the entire injury in damages. He cannot split up his damages and have separate and independent recoveries. This principle obtains in all classes of actions. The rule, says judge COWEN, in *Bender-nagle* agt. *Cocks* (19 *Wend.*, 215), "goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action." So it was held in *Phillips* agt. *Berick* (16 *John.*, 137), that a claim arising from one entire contract, or from one single tortious act, cannot be divided into distinct demands and made the subject of separate actions (See, also, *Farrington* agt. *Payne*, 15 *John.*, 432; *Fish* agt. *Folley*, 6 *Hill*, 54; *Bull* agt. *Cotton*, 22 *Barb.*, 94-96; *Secor* agt. *Sturgis*, 16 *N. Y.*, 558; *Staples* agt. *Goodrich*, 21 *Barb.*, 317; *Burritt* agt. *Belfy*, 47 *Conn.*, 323; *S. C.*, 36 *Am. Rep.*, 79). As regards prospective damages, it is laid down in *Moak's Underhill on Torts* (p. 82), as follows:

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"The jury should take into consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of the defendant, for the damages, when given, are taken to include all the hurtful consequences arising out of the wrongful act, unknown as well as known."

Now, as has been observed, the former actions embraced all wrongful acts committed by the defendant prior to October 15, 1875, and none are charged or proved against him subsequent to that time. He was charged in those suits with removing and injuring the pipe, and with preventing the plaintiff from relaying and repairing it, and also with injuries resulting therefrom by reason of being deprived of water at his dwelling and farm buildings. For these causes of action damages were awarded him. This action was then brought to recover further damages occasioned by the same unlawful acts. According to the authorities it was barred by the former recoveries. Let us examine the question a little on principle. A. has a right of way over B.'s land, with the right to keep and maintain it in repair. B. obstructs the way by digging a pit across it. Thereupon A. sues B. for this wrongful act, and recovers his damages. He recovers (1) an amount sufficient to meet the expense of restoring the way to its former condition of usefulness; and (2) such temporary damages as he may have sustained by reason of being hindered in the use of the way, and as the delay would cease with his own election to repair, he could recover for such delay only as was necessary to him in order to make repair. By the recovery, then, A. is indemnified for the entire injury. He has the money in hand, obtained by the recovery, with which to fill the pit and restore the way, and also such sum in addition as was deemed adequate for the time during which he was necessarily delayed in his use of the way. May he now omit to restore the way and recover further damages from year to year in repeated actions, because the pit remained unfilled? Again: A. has the right to maintain a pump in a well on B.'s land, and to take water therefrom by means of the pump.

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B. removes and destroys the pump. Thereupon A. sues B. for those unlawful acts and recovers his damages. Those damages would be such sum as would meet the expense of replacing a pump in the well, of equal value and usefulness with the one removed and destroyed, with an additional sum to cover the damages to A. during the time he would be necessarily delayed in replacing the pump. May A. omit to replace the pump and have damages against B. for such omission year after year, by repeated suits? Especially (and this interrogatory has direct significance in view of the injunction granted in this case), may A. have such repeated actions for damages when B. has been enjoined, at the instance of the former, from all intermeddling with his rights in the well? The question is well answered by the decision in *Loker agt. Damon* (17 *Pick.*, 284), where it is held that in assessing damages for a tort, the immediate consequences of the injurious act are to be regarded, and not those which the party injured might have prevented by his own action. But it is suggested that the plaintiff was deterred by the threats and violent conduct of the defendant from replacing and putting the pipe in condition for usefulness. Not so, however, after October 15, 1875, nor indeed for years preceding that time. Yet judgment was awarded in this third suit for damages which occurred between October 15, 1875, and the 1st day of May, 1877, "*by reason of the defendant's wrongful act in removing the pipe from the spring, and preventing the plaintiff from repairing the pipe*" (finding XV). These causes of damage, and each of them, were especially commented on in the former actions, and damages were awarded in both suits. Those recoveries must be presumed to embrace all damages to which the plaintiff was entitled growing out of those wrongful acts, past and prospective. Judge STRONG lays down the rule here applicable in *Secor agt. Sturgis* (16 *N. Y.*, 554), as follows: "The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which

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it is rendered, whether the suit embraces the whole or any part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits;" and the learned judge further says: "In the case of torts, each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be" (*page* 558). The recovery in this case cannot, as we think, be sustained.

Judgment reversed, new trial granted, costs to abide the event.

BOARDMAN, J., concurs.

It seems to me that this is right. W. L. LEARNED.

COURT OF APPEALS.

BAINE, respondent, agt. THE CITY OF ROCHESTER, appellant.

Municipal corporations — Actions against — Costs in — Plaintiff to recover must present claim to chief fiscal officer before action — That chief fiscal officer has no authority to pay is no answer to this requirement — In actions against, if plaintiff recovers fifty dollars or over, defendant is not entitled to costs, although claim is not presented — Non-presentation of claim is not a defense to action nor a fact in issue — To what facts certificate entitling party to costs applies — Code of Civil Procedure, sections 3228, 3229, 3245, 3248.

In an action against a municipal corporation, a plaintiff demanding judgment for a sum of money only, who fails to present his claim for payment to the chief fiscal officer (*i. e.*, the treasurer) of such corporation before the commencement of the action, cannot, under section 3245 of the Code of Civil Procedure, be awarded costs, although he recover a

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verdict against the corporation. It is no answer to this requirement that the chief fiscal officer is not authorized to adjust and pay the claim on presentation.

When the plaintiff fails to so present his claim, and recovers the sum of fifty dollars or more, the defendant does not, by reason of the plaintiff's not being entitled to costs, become entitled thereto; that the plaintiff is not entitled to costs under such circumstances is not a case specified in section 3228 of the Code of Civil Procedure, and the defendant is, therefore, not entitled to costs under section 3229.

A plaintiff who recovers a judgment against a municipal corporation for more than fifty dollars, should not be subjected to the payment of costs, as a penalty for non-presentation of his claim, in addition to being deprived of the right to costs given in other cases.

The certificate to entitle a party to costs, &c., provided for by section 3248 of the Code of Civil Procedure, is of some fact appearing on the trial, and has no application to facts extrinsic to the action, and which have no connection with the issue.

The non-presentation of a claim against a municipal corporation to its chief fiscal officer, is not a defense to the action, and not a fact involved in the trial; and the certificate referred to in section 3248 is not required as to the fact of non-presentation.

June, 1881.

APPEAL from an order of the general term, fourth department, affirming an order of the county court of Monroe county, setting aside a taxation of costs in favor of the defendant and against the plaintiff.

The action was brought in the county court of Monroe county against the city of Rochester to recover for services, and the plaintiff obtained a verdict for \$228.58.

Before the commencement of the action the plaintiff presented his claim for payment to the common council instead of the city treasurer, the chief fiscal officer of the city.

The defendant, notwithstanding the verdict, served a bill of costs in its favor, and noticed the same for taxation before the clerk of the court, on the ground that the plaintiff, having omitted to present his claim to the proper officer, could not, under section 3245 of the Code of Civil Procedure, be awarded costs, and that the plaintiff, not being entitled

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thereto, they should be taxed in favor of the defendant under section 3229. The plaintiff opposed the taxation on the ground, among others, that there was no competent evidence before the clerk that the plaintiff had not presented his claim to the proper officer, and that the only competent evidence of such fact would be a certificate of the judge who presided at the trial, as provided by section 3248. The clerk taxed the costs in favor of the defendant.

J. R. Fanning, for appellant.

A. L. Barton, for respondent. The powers and duties of the common council in regard to auditing, allowing and paying claims, and the raising of money to pay them, and the restrictions on the treasurer against paying except as ordered by the common council, remain, under chapter 14 of the Laws of 1880, the same as they were when *Butler* agt. *City of Rochester* (4 *Hun*, 32) was decided (*McClure* agt. *Supervisors, &c.*, 4 *Abb. N. C.*, 202).

ANDREWS, *J.*—The plaintiff was not entitled to costs, for the reason that he failed to present the claim for payment to the city treasurer, who, by section 72 of chapter 14 of the Laws of 1880, is declared to be the chief fiscal officer of the city, before the commencement of the action (*Code of Civil Procedure, sec. 3245.*)

It is not an answer to this requirement of the Code that the city treasurer was not authorized to adjust and pay the claim on presentation. The object of the Code was to insure notice to a municipal corporation of claims against it before it should be subjected to the costs of suit, and notice to the chief fiscal officer was prescribed as the means of giving notice to the corporation.

Section 3248 does not apply to this case. The certificate there provided is of some fact appearing on the trial, and has no application to facts extrinsic to the action and which have

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no connection with the issue, and of which the court or referee may have no knowledge.

The non-presentation of a claim against a municipal corporation to its chief fiscal officer before suit brought, pursuant to section 3245, is not a defense to the action, and is not a fact involved in the trial, and it cannot be supposed that the legislature intended that, as to such a fact, the certificate of the court should be required.

The claim of the defendant to costs cannot be supported. By the fourth subdivision of section 3228, the plaintiff is entitled to costs in an action on a money demand, other than those previously specified, provided he recovers fifty dollars or more; and by section 3229 the defendant is entitled to costs in an action specified in section 3228, unless the plaintiff is entitled to costs as therein specified. Section 3229 does not apply to a case where the plaintiff recovers fifty dollars or more, but who is prevented from recovering costs for non-presentation of the claim under 3245. This is not one of the cases specified in 3228.

It was not, we think, intended that the plaintiff who recovers a judgment against a municipal corporation for more than fifty dollars, should be subjected to the payment of costs, as a penalty for non-presentation of his claim, in addition to being deprived of the right to costs given in other cases.

The order of the general term and of the county court should be modified by declaring that neither party is entitled to costs, and, as thus modified, it should be affirmed, without costs to either party.

All concur.

Watt agt. Reilly.

SUPREME COURT.

WATT agt. REILLY.

Responsibility of sheriff — Liability as bail.

Where a defendant, after arrest, has been allowed to go at large after giving an undertaking, the sheriff becomes liable as bail until the sureties in the undertaking justify and are approved by the court.

Where at the time a *supersedeas* is granted, the defendant is still at large and the sureties have not justified, the sheriff is still liable as bail and can only be exonerated from that liability in the same manner as ordinary bail.

Although the *supersedeas* might have been a protection to the sheriff as long as it remained in force, yet, when the court, at general term, reversed the order allowing the *supersedeas*, the liability of the sheriff as bail revived.

At Circuit, January, 1882.

Jacob Fromme and S. Jones, for plaintiff.

Robert S. Green, for defendant.

LAWRENCE, J. — The schedules which both parties assumed on the trial to be annexed to the complaint are not annexed to the copy of the complaint furnished to the court, but, as all agree as to the contents of those schedules, I can dispose of the case without them. The defendant having been allowed to go at large after giving an undertaking, the sheriff became liable as bail until the sureties in the undertaking justified and were approved of by the court (*Code, sec. 587; Bensell agt. Lynch, 44 N. Y., 162; Brady agt. Brundage, 59 N. Y., 310; Von Gerhardt agt. Lighte, 13 Abb., 101*). At the time the *supersedeas* was granted — as the defendant was still at large and as the sureties had not justified — the sheriff was still liable as bail, and could only be exonerated from that liability in the same manner as ordinary bail (*Brady agt.*

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Brundage, 59 N. Y., 310). Granting, then, that the *supersedeas* might have been a protection to the sheriff as long as it remained in force, when the court, at general term, reversed the order allowing the *supersedeas*, the liability of the sheriff as bail revived. The case of *Von Gerhardt* agt. *Lighte* (13 Abb., 101) is directly in point. There the general term of the common pleas held (judge BRADY writing the opinion) that bail are not exonerated absolutely by the judgment in favor of their principal, but that if the judgment is set aside and the plaintiff is allowed to proceed in the action, their liability revives.

There is nothing in the case of *Pfander* agt. *Bowe* (MSS. opinion, general term), as I understand it, which conflicts with these views. In that case it did not appear that the sheriff's liability as bail had become fixed before the court ordered the discharge of the prisoner, and it was held that the sheriff was not liable in an action for damages for having allowed the prisoner to go at large in obedience to the order of the court. But in this case we should not lose sight of the fact that the sheriff, at the time of the issuing of the *supersedeas*, and ever since he served the order of arrest, had been liable to the plaintiff as ordinary bail for the appearance of the defendant.

Now that the *supersedeas* has been set aside, I do not see how he can justly complain if the court does as it would do in the case of all other ordinary bail — *i. e.*, simply relegates him to the position in which he stood before the *supersedeas* was issued.

I am of the opinion that the plaintiff is entitled to judgment.

Matter of Wacher.

SUPREME COURT.

In Matter of JOHN WACHER.

Criminal law — Party convicted before justice of the peace in Albany county "as a disorderly person," may be sentenced to Albany penitentiary — Code of Criminal Procedure, section 903 — Provisions as to punishment of disorderly persons in Albany county — Laws of 1844, chapter 152; Laws 1847, chapter 183, not repealed by this section.

A special local statute is not repealed by a general statute, unless the intent to repeal is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter.

Chapter 152 of the Laws of 1844, which establishes the Albany penitentiary, and chapter 183 of the Laws of 1847, amendatory thereto, and which require a person convicted before one of the justices of the peace in and for the city and county of Albany of being a disorderly person and sentenced to hard labor, to be sent to such penitentiary, are still in force and unrepealed by the Code of Criminal Procedure.

Therefore, notwithstanding the provisions of section 903 of the Code of Criminal Procedure, a person convicted before and by one of the police justices of the city of Albany of being a disorderly person, may be sentenced to imprisonment in the Albany penitentiary at hard labor, instead of being committed to the Albany county jail.

Ulster, Special Term, October, 1881.

APPLICATION by *habeas corpus* to discharge Wacher from imprisonment in the Albany penitentiary.

M. D. Conway, for prisoner.

D. Cady Herrick, district-attorney, for the people.

WESTBROOK, *J.*—John Wacher was on the 16th day of September, 1881, duly convicted before and by William K. Clute, one of the justices of the peace in and for the city and county of Albany, and police justice of the city of Albany, of being a disorderly person, and was, upon such conviction, sentenced to imprisonment in the Albany peniten-

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tiary at hard labor for the term of six months, or until he should give the bond required by the justice, and which is in the commitment distinctly specified.

The only point urged in favor of the prisoner's discharge is, that he should have been committed to the Albany county jail, and not to its penitentiary, and it is founded upon section 903 of the Code of Criminal Procedure, which reads: "The magistrate must immediately cause the certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must, by a warrant signed by him, with his name of office, commit the defendant to the county jail, or in the city of New York, to the city prison or penitentiary of that city, for not exceeding six months at hard labor, or until he give the security provided in section 901."

The district-attorney, on the other hand, contends that chapter 152 of the Laws of 1844, which establishes the Albany penitentiary, and chapter 183 of the Laws of 1847, amendatory thereto, and which require a person convicted of the offense the petitioner is, and sentenced to hard labor, to be sent to such penitentiary, are still in force, and unrepealed by the Code.

The sole question then is, has the Code, by the section given, repealed the special laws in regard to the Albany penitentiary in this particular?

Title 7 of the Code of Criminal Procedure, entitled "Of proceedings respecting disorderly persons," of which section 903 forms a part, is a substantial re-enactment of title 5 of chapter 20 of the first part of the Revised Statutes (*Eds. Stat.*, 591), entitled, "Of disorderly persons." The old statutes, as the Code now does, required the sentence to be to the county jail, and the effect of the local acts in regard to the penitentiary was to make that, instead of the jail, the place of confinement for that class of offenders in the city and county of Albany. The statutes were in no wise in conflict, the manner of punishment was not changed,

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but thenceforth, after the passage of the local Albany acts, the disorderly person adjudged to imprisonment at hard labor within the city and county of Albany was to be confined in a prison called a "penitentiary" instead of a prison called a "jail." Were the special and local acts repealed by the re-enactment of certain parts of the Revised Statutes in the Code of Criminal Procedure?

It is a general rule of law that a special local statute is not repealed by a general statute, unless the intent to repeal is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter (*Matter Com'rs of Central Park*, 50 N. Y., 493; *People agt. Quigg*, 59 N. Y., 83; 69 N. Y., 209). I am unable to find in the re-enactment of the provisions of the Revised Statutes in regard to disorderly persons any clear and manifest intent to repeal the local statutes, which had so long harmoniously existed with the old general laws, of which the new is almost a transcript. I can only see in such re-enactment a desire to adopt and retain as a part of the general criminal Code of Procedure of the state a certain wise old mode of procedure as to certain offenders and offenses, without changing or repealing certain local statutes as to the place of confinement. It is true that the Code as it reads would, were it not for the special statutes, require the petitioner's imprisonment in the Albany county jail, and not in its penitentiary, but this is not enough (*see cases before cited, and especially judge ALLEN's opinion in 50 N. Y., 497*); but the intention of the legislature to repeal or alter the particular law must also be manifest. As this intent is not manifest the result of my examination is, that the petitioner must be remanded to the keeping of the warden of the penitentiary.

Herzig agt. Metzger.

N. Y. MARINE COURT.

ANNIE HERZIG, appellant, agt. LOUIS METZGER, respondent.

New trial — Order granting, may be reviewed by the same judge and vacated and new trial denied — Code of Civil Procedure, section 999.

The entry of a final order granting a motion for a new trial on the minutes does not prevent the judge upon the same papers from listening to a rehearing on application of the defeated party, and making an order vacating the former final order, and deciding the motion the other way by denying it.

General Term, November, 1881.

THE plaintiffs made a motion for a new trial upon the minutes, on the grounds prescribed by section 999 of Code. Judge GOEPP decided to grant it with a stay pending appeal.

Final order granting the motion was entered of June fourth. On order to show cause of June seventh, procured by defendant, upon same papers, the judge entered an order, June fourteenth, that the order of June fourth be in all respects vacated and the new trial denied, with ten dollars costs.

Appeal was taken from order of June fourteenth by plaintiffs alleging in their notice of appeal want of power in the judge to make it.

No appeal was taken from the one of June fourth. This would have involved expense of making and serving a case, as well as printing it. On hearing this appeal the general term took the judgment-roll and stenographer's minutes as produced from the files.

Charles H. Smith, for appellants. "A review of a judgment at special term cannot be had at another special term. Only remedy is by appeal" (*People agt. Church*, 2 *Lans.*, 465; *Libby agt. Rosenkrans*, 55 *Barb.*, 215).

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Jacobs Bros., for respondent, argued the order appealed from is one resting in the discretion of the court making it, and not reviewable (*Hall agt. Emmons*, 8 *Abb. [N. S.]*, 454; *White agt. Munro*, 33 *Barb.*, 654; *Belmont agt. Erie R. R.*, 52 *Barb.*, 642; *Bolles agt. Duff*, 56 *Barb.*, 567). Technical questions of practice ought to be disregarded (*McCoun agt. N. Y. C. R. R.*, 50 *N. Y.*, 176).

SHEA, *Ch. J.* — The order appealed from is one which rests in the judicial discretion of the judge who made it; and we cannot declare, after a consideration of the record, that his discretion was not very properly exercised in the case presented to him. It was clearly within his power to reconsider his previous decision on the motion for a new trial, as announced inadvertently.

The order appealed from is affirmed, with costs to respondent.

NEHRBAS, J., concurs.

NOTE.—There is no appeal to the court of common pleas from this decision allowed by the Code.—[ED.]

N. Y. SUPERIOR COURT.

GEORGE BELL, in his own behalf, &c., appellant, agt. JOSEPH A. DONOHUE and another, impleaded, &c., respondents.

Stay of proceedings—when action is brought in another state, and another action for the same relief is brought in this, party compelled to elect which he will prosecute and stipulate to stay proceedings in the other.

Where plaintiff brought an action against defendant D., in another state, and then brought this action against him with others for the same relief, he should be compelled to elect which he will first prosecute, and to stipulate to stay proceedings in the other.

General Term, November, 1881.

Bell agt. Donohoe.

APPEAL by plaintiff from order directing a stay of proceedings in this action until the determination of an action in the United States circuit court for the district of California.

Scott Lord, for appellant.

W. W. Whitehead and *M. W. Devine*, for respondents.

SEDGWICK, *Ch. J.*—The plaintiff began an action in the United States circuit court for the district of California. The ultimate relief asked in that was the same as in this action. The plaintiff's cause of action involved a setting aside of a settlement and agreement between one of the present defendants and a corporation. In the California action that corporation was not made a party. In the present action that corporation has been made a party defendant, and also one of the appellants who was not joined in the California action. In the California action the bill was demurred to, but no decision has been rendered. After argument of the demurrer in this case an answer has been served.

I am of opinion that it would be inequitable and vexatious to at least the appellant Donohoe to allow the present action to proceed while the plaintiff was pursuing him for the same cause in California (1 *Daniel's Ch. P.*, 635, citing *Durand agt. Hutchinson, La. Red.*, 248). The difference of parties does not affect the case as to him, except that it may be supposed that the action in California could not be successful without the corporation that has been made defendant here. I do not think, in view of the circumstances that called for the attempt to set aside the settlement referred to, that the plaintiff should, at all events, be stayed here, and forced to proceed with the California action. The more equitable course would be to compel him to elect which he will first prosecute to an end or until it is discontinued, and to stipulate to stay proceedings in the other (1 *Daniel's Ch. P.*, 815).

The defendants should not have had costs of motion. The order below will be modified by striking out the costs of

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motion, and by making the stay in this case continue until the plaintiff shall elect, in writing, which action he will prosecute, at the same time stipulating to stay the proceedings in the other action during the pendency of the former action. The order is not in any event to stay the entering of the proper order in the action in California when a decision as to the demurrer shall be made. Neither party to have costs of appeal.

SUPREME COURT.

In the Matter of JOSEPH HUSSON, an Attorney.

Attorney—right of proceeding summarily against—Practice as to such proceedings.

In order to give the right of proceeding summarily against an attorney, it is essential that he was intrusted in the transaction by reason of his professional character, and that he was acting as an attorney in respect to the particular matter which is the ground for the application.

Where an attorney is engaged in a personal transaction with his client, unconnected with his professional character, the fact that he was at such time employed as the attorney for the petitioner in other matters, will not authorize the application.

First Department, General Term, December, 1881.

Before DAVIS, P. J., DANIELS and BRADY, JJ.

THIS is an appeal from an order made at special term, directing the respondent, Joseph Husson, as an attorney of the court, to restore to the petitioner, Catharine Raymond, a certain mortgage unimpaired which had been satisfied by the petitioner at the request of Husson, or pay the sum of \$3,280, being the amount of said mortgage with the interest thereon, and the further sums of \$250, as counsel fee, and \$112 referee's fees, and in default thereof the respondent be punished as for a contempt, and that an attachment issue directing the sheriff to imprison said respondent.

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In appears that in the fall of 1873 the petitioner, Catharine Raymond, had a large amount of money which she wanted to invest, and knowing Husson as a lawyer, applied to him as such to invest the same for her; and finally the sum of \$9,000 was loaned to said Husson in January, 1874, secured by bonds and mortgages of \$3,000 each upon property owned by said Husson, and consisting of three houses and lots in Brooklyn. In the month of March, 1878, Husson obtained from the petitioner a satisfaction of one of said mortgages, stating that he had an opportunity to dispose of one of said houses, and would give her a new mortgage equally as good as the other; and the neglect to give this new mortgage was the cause for the present application. It was conceded by the respondent that he had acted as the attorney for petitioner in other actions and proceedings.

Respondent refused to introduce any evidence in his behalf in this proceeding, on the ground that the court had no jurisdiction upon a summary application against him as an attorney of the court.

Abram Kling, for appellant.

Theron T. Strong, for respondent.

DANIELS, *J.*—The appellant was engaged in the practice of his profession as an attorney, and was employed by the petitioner to perform services for her in that capacity. She had in possession the sum of \$9,000, which she desired to have invested, and under her authority Husson was consulted by her husband upon the subject of finding an opportunity for such investment. About a week after such consultation took place, Husson suggested to Mr. Raymond that he would like to borrow some money himself, for which he would give bonds and mortgages. This suggestion resulted in an arrangement with Mrs. Raymond by which Husson was to have the \$9,000, and it was delivered to him upon the understanding that proper securities should be executed and delivered for the

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repayment of the amount. After that time such securities were executed and delivered by him. While they were held for or on behalf of the petitioner, they were, at the request of Husson, surrendered to him for the purpose of being replaced by other securities of a similar nature. Such securities were also afterwards made and delivered, but by their terms an unauthorized extension of time for the payment of the debt for the period of about eighteen months. After the securities had been delivered, and while they were held by Mrs. Raymond, the petitioner, Husson applied to her for one of the mortgages, together with a satisfaction of it. This application was made upon the representation that he desired to sell one of the houses and lots, and could not otherwise make a clear title to it; that he had plenty of other property and could replace this mortgage by another just as good. She delivered the mortgage to him, with the satisfaction of the same, which was afterwards entered of record. No other security was at any time substituted in place of the surrendered mortgage, and it was because of the neglect or refusal of the attorney to deliver such a security, in fulfillment of the terms of his obligation, that the fine in question was imposed upon him by the court.

In support of the appeal taken it has been urged that the attorney was not subject to a summary application of this nature for the redress of the wrong perpetrated by him. Under the evidence which was given, his conduct seems to have been fraudulent in its character, and by means of it he succeeded in depriving the petitioner of a mortgage held by her for the sum of \$3,000, besides interest. But the practice of the courts has not extended so far as to justify a proceeding of this nature against an attorney simply because he has been guilty of fraudulent misconduct in his dealings with other persons. It extends, on the contrary, no further than to restrain and punish the attorney for his misconduct in exercising the functions of his office, or when it is connected with some professional employment. Whenever he may be

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employed professionally, or moneys in that capacity may pass into his possession, and he conducts himself dishonestly or unprofessionally, he may be punished by means of this summary proceeding; and it would very properly be denominated a special proceeding, as that phrase has been made use of in section 14 of the Code of Civil Procedure. But where he may have engaged in transactions having no relation to the practice of his profession or the exercise of his official functions as an attorney, there his conduct cannot be redressed by a proceeding of this nature. In instances of that character he acts simply as an individual, and without reference to the fact that he may be a member of the legal profession. Confidence may, it is true, be reposed in him by reason of professional relations existing between himself and the person dealing with him, and in that manner the transactions themselves forming the subject of complaint may be induced. But because that may be the case it does not follow that jurisdiction of this nature can be exercised over the defaulting party. The rule, on the contrary, is that for wrongs arising out of such transactions the means of redress are the same as those ordinarily applied in the course of legal proceedings, and they are by actions, as distinguished from proceedings of the nature of those taken against the appellant. The transaction between the parties, as it has been presented, consisted simply of a loan of \$9,000 by the applicant to Husson, the repayment of which he secured by bonds and mortgages. After the applicant was fraudently induced by him to surrender and satisfy one of the mortgages, upon his promise to replace it by another of equivalent security. That he failed to do, and by that failure became liable to her for the loss or injury which she has sustained.

It is clear that in all that was done he was acting solely for himself, and not as an attorney. It was a transaction throughout with him as an individual, having no relation whatever to his professional character, and for that reason his misconduct in it could not be punished by means of a proceeding adopted

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and maintained solely for the purpose of controlling the conduct of attorneys in their relations with their clients. The rule upon this subject is, that where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute the trust reposed in him, but when the employment is connected with his professional character, as to afford a presumption that it formed the ground of his employment, there the court will exercise this jurisdiction over him. Accordingly where he is employed to prepare deeds or conveyances, or to perform any other act belonging or appertaining to the profession of law, and his obligations to perform it faithfully arises out of the duty imposed upon him in that character, and he receives money or property in that capacity, he may be summarily compelled to observe all the obligations of good faith and fidelity in such dealings, and that practically is the extent of the control which the court can exercise over the conduct of an attorney upon such application (*Cocks* agt. *Hannon*, 6 *East*, 404; *Matter of Love*, 8 *East*., 237; *Matter of Lord*, 2 *Scott*, 131; *Anonymous*, 19 *Law Journal*, [Exch.], 219; *Matter of Cutts*, 16 *Law Times* [N. S.], 715; *Gorham* agt. *Bishop*, 1 *Salk.*, 87; *Matter of Hitkin*, 4 *Barn. & Ald.*, 47; *Matter of Cordross*, 5 *Mess. & W.*, 545; *Matter of Haskins*, 18 *Hun.*, 42; *Matter of Chitney*, 4 *Hill*, 46; *Matter of Dakin*, 4 *Hill*, 42).

The case of *Chester* (17 *How.*, 260) is not in conflict with the rule which has been stated, for it there appeared that the attorney received the money which he failed to invest in his professional capacity as such.

While it is true that Husson did act in other matters as the attorney of the petitioner, it is equally so that this transaction was not of that character. The remedy of the applicant for the wrong to which she has been subjected was that of an ordinary action, and not of a proceeding of this nature. The order consequently must be reversed and the application denied, but without costs to the appellant.

Lansing agt. Ensign.

SUPREME COURT.

JOHN LANSING agt. ANDREW J. ENSIGN.

Attorney's lien — Answer — What may be set up in — Code of Civil Procedure, section 66.

In an action by attorney for professional services, the answer set up settlement and payment, also waiver of lien of the attorney for costs. On a motion to strike out on the ground of immateriality and redundancy and for judgment:

Held, that these matters are neither immaterial or redundant.

Matters accruing after suit commenced and before answer is put in, may be set up in the answer.

The attorney, under section 66 of the Code of Civil Procedure, has an absolute lien for his compensation.

Onondaga Special Term, November, 1881.

ACTION to recover for professional services. The answer sets up two defenses, settlement and an agreement by plaintiff's attorneys to charge defendant no costs if a certain amount was paid. The answer was defective and a motion was made at special term, held at Syracuse, to strike out portions of the answer on the ground that they were not separately stated and numbered, and also on the ground of immateriality and redundancy, and for judgment on the pleadings.

The affidavits were entirely contradictory.

Anson B. Moore, for motion.

N. Whiting, opposed.

H. M. Haigh, plaintiff's attorney.

MERWIN, J.— Motion by plaintiff to strike out paragraphs two and three of the answer on the ground that they are not separately stated and numbered, and also on the ground that they are immaterial and redundant, and also for judgment.

Ruppert agt. Haug.

I think the paragraphs referred to are separately stated and numbered sufficient to answer requirements of the Code.

There are several cases holding that matters accruing after suit commenced and before answer is put in, may be set up in the answer. Paragraph two sets up settlement and payment. Paragraph three sets up waiver of lien of the attorneys for costs, which was necessary to be done in order to accomplish a full settlement. The attorney, under section 66 of the Code, has an absolute lien. These matters are neither immaterial or redundant. If the motion for judgment was based on the denial in the answer I should be inclined to grant it, but with the rest of the answer in, it cannot be granted.

Motion denied, with costs of motion to defendant to abide the event.

COURT OF APPEALS.

JACOB RUPPERT agt. CHRISTIAN F. HAUG.

Attachment— What the affidavit must state— How and to whom motions to vacate must be made— Code of Civil Procedure, sections 636-683.

A statement in an affidavit upon an application for an attachment that "the defendant is indebted to the plaintiff in the sum stated, and that he is justly entitled to recover said sum," does not satisfy the requirement of section 636 of the Code, that the affidavit must show that the debt due was over and above "all counter-claims."

Where an application to vacate an attachment is made to the court, upon notice, the presiding judge need not be the one who granted the attachment.

Decided December 1881.

IN this case a motion was made to vacate an attachment against the property of defendant. The application was by a subsequent attaching creditor, on the ground that the affidavit did not show that the debt due was over and above "all

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counter-claims." The plaintiff objected to the motion being heard before any other judge than he who granted the attachment. This objection was overruled by judge LAWRENCE, who also vacated the attachment because of the defect mentioned. The general term affirmed the decision, and the court of appeals sustained the tribunal below and rendered the following opinion :

Mr. Fitch, for appellant.

Blumensteil & Hirsch, for respondent.

DANFORTH, J. — The case furnished the court contains no index (*Rule 5*), nor do the papers composing it purport to be certified or to be copies of the return. The rules (1, 5 and 8) as to these matters should have been complied with. Assuming, however, that they are copies of those used below, we find no error in the order appealed from. It sufficiently appears that the action is for the recovery of damages for breach of contract, and the plaintiff's right to an attachment is to be determined by the provisions of section 636 of the Code. By those he must show by affidavit that he "is entitled to recover a sum stated therein over and above all counter-claims known to him." It is enough if the affidavit shows this to the satisfaction of the judge who receives the application for the warrant, but there must be some evidence (*Steuben Co. Bank agt. Alberger*, 78 N. Y., 252). The very words of the statute need not be followed, although they furnish the nearest formula. Neither they nor equivalent words were in the affidavit. It may be true, as the affidavit states, that "the defendant is indebted to the plaintiff in the" sum stated, and that he is "justly entitled to recover said sum;" but it does not follow that the defendant has not, to the knowledge of the plaintiff, a counter-claim. If he has, it need not be set up, and although judgment should go against the defendant in this action, it would be no answer to a subsequent action by

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him for its recovery (*Brown* agt. *Gallaudet*, 80 *N. Y.*, 417). The words used have no tendency to show that a counterclaim does not exist. The affidavit, therefore, was insufficient to give the judge jurisdiction to grant the warrant (*Donnell* agt. *Williams*, 21 *Hun*, 216). But, it is now objected by the appellant that the court in vacating the attachment acted without jurisdiction: First, because the presiding judge was not the one who granted the attachment. This objection rests on section 683 of the Code, but it will not sustain it. Its provisions distinguish between a court and a judge; provides that the application to vacate must be made to the court, in which case the moving party becomes subject to the usual practice as to notice and time and place of hearing, or to a judge, and in that event to the judge who granted the attachment, whether he is in court or out of court, and subject to his direction whether the application shall be heard *ex parte* or upon notice. The motion to vacate the attachment was in fact made to the court at special term, and was properly entertained by it. Second, the affidavit of the party moving to vacate was sufficient. It shows that the warrant issued September 3, 1880, to the sheriff of the city and county of New York, and the property of the defendant attached; the issuing of executions of September 8, 1880, for the enforcement of judgments against the same debtor, to the same sheriff, and the levy by him on those executions upon "the property" of the defendant. From these averments no other inference can be drawn than that the attachment and executions were levied upon the same property, and that the lien by execution was acquired after the property was attached. The affidavit, however, goes further and declares that "the lien of the executions is subsequent to that of the attachment." In all respects the affidavit of the moving party was sufficient to give him a standing in court, and as the affidavit on which the attachment issued was insufficient to confer jurisdiction, it was properly vacated and the order appealed from should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Baron agt. Cohen.

SUPREME COURT.

SAMUEL BARON, respondent, agt. JACOB COHEN, impleaded, &c.

Counsel employed by attorney to argue demurrer — scope of his authority.

Where a counsel, employed by the attorney of defendant to argue a demurrer to the complaint, omitted to appear when the case was called, such employment did not authorize him to make a verbal stipulation, for the purpose of procuring assent to the opening of his default, that the decision upon the demurrer should be final in the case; and even were the stipulation within the terms of the counsel's authority, the defendant should be allowed on terms, upon a proper case shown, to serve his answer.

First Department, General Term, October, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from so much of an order as refused the defendant leave to answer upon a decision overruling his demurrer to the complaint.

Benno Leowy, for appellant.

Rudolph Sampter, for respondent.

PER CURIAM.—The defendant was denied leave to answer the complaint because of a verbal stipulation made by his counsel, for the purpose of procuring assent to the opening of his default, that the decision upon the demurrer should be final in the case. A default had been taken against him, and that was opened upon this understanding, and the demurrer was then brought to an argument. The counsel by whom this agreement was made was not the defendant's general counsel or attorney in the case, but he was employed by the attorney to argue the demurrer, for the reason that the attorney found it necessary to absent himself for the purpose of

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attending a national political convention. The only authority given by him to the counsel was that included in his employment, which was merely to argue the demurrer. And that, by no reasonable construction of its terms, would seem to extend so far as to authorize him to deprive the defendant of his right to answer the complaint, when that was conceded only as an inducement for opening a default, taken because this counsel omitted to appear and argue the demurrer when the case was called for that purpose.

But a case was made on behalf of the defendant which entitled him to be allowed to answer the complaint, even though the agreement made by the counsel appearing in his behalf had been within the scope and terms of his authority. An affidavit of merits was presented, together with other affidavits, satisfactorily sustaining the propriety of the application made in his behalf for leave to answer. And no such delay intervened as to render the defendant chargeable with laches in bringing on the application. The order, under the circumstances, should be modified in such a manner as to permit the defendant to serve his proposed answer within twenty days after notice of this decision, without prejudice to the other proceeding in the action, upon paying the costs of the demurrer, and without costs of this appeal.

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SUPREME COURT.

AUGUSTA WEIDERSUM *et al.* agt. HENRY NAUMANN *et al.*

Partition — Action to set aside judgment for fraud or collusion — What proof necessary — Purchaser who takes title under judgment of court, that is without jurisdiction to grant it, acquires no title — The remedy of a party having title is by ejectment — Purchasers not responsible for acts of parties in the judgment of which they had no notice — New trial — Where infants have been injuriously affected by misconduct of the attorneys, &c. — Power of court to grant.

A purchaser of property who takes title under a decree or judgment of a court that was without jurisdiction to grant it, acquires no title, and any party having a valid title, but out of possession, may bring ejectment. Purchasers of property under a decree or judgment of the court are not responsible for the acts of the parties in that judgment, of which they had no notice.

Before a decree or judgment of a court can be set aside, the parties interested must have an opportunity to be heard, and therefore must be made parties to the action in which the decree or judgment is sought to be set aside. To justify any interference with the judgment of a court, the testimony as to fraud or collusion must be very clear and strong; there must be clear and conclusive evidence of fraud.

Where infants have been injuriously affected by the misconduct of the attorneys in the action, either by surprise or if any newly discovered evidence can be secured, the court in which the action was brought has power to grant a new trial.

Equity Term, June, 1881.

THE complaint alleged that one Adam Muller was seized in fee simple of certain premises in the city of New York; that he died leaving a will wherein he devised to his children and heirs in common, among other property, the premises described in the complaint, subject to the interest of his widow to the share of rents and income as provided by said will. That an action was commenced in this court by Thomas H. Young, the husband of one of the testator's children, to recover his right of courtesy in said property; that the com-

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plaint in said action was dismissed on the trial with costs; that an appeal was taken to the general term of this court, where said judgment of dismissal was reversed; that said action was revived in favor of the children of another daughter of the testator, who died pending the appeal; that the action was on the calendar for trial after being revived, but was not tried; that while said appeal was pending other actions were pending in the superior court, brought by the said Young and Charles Struppmann, Sr., as administrators, to recover the personalty of their deceased wives' share of the estate left them in their father's will; also an action brought by two of the infant children of Adam Muller, deceased, for partition or sale of the property. That the said Young and his attorneys, the attorneys of the two infant Muller children and the attorneys for other defendants in that action entered into a conspiracy to cheat and defraud the plaintiffs out of their property and estate, caused the suit in the supreme court to be marked "off the calendar by consent," and with the same unlawful intent and in furtherance of said conspiracy did falsely and fraudulently obtain an order consolidating the supreme court action with the superior court actions from one of the justices of the superior court; that all of said actions so consolidated into one were afterwards tried as one action in the superior court and a judgment therein rendered, wherein all the real estate of the plaintiff was adjudged to be sold. That said statements and representations were false and untrue; that in the supreme court action one Daniel T. Robertson was the attorney of record for some of the infant defendants, and that he never was consulted, nor did he consent that the supreme court suit should be marked "off the term," nor was he present when the order of consolidation was obtained, nor did he have any knowledge, direct or indirect, of the acts and doings of the other attorneys until long afterwards, and that therefore his infant clients did not have their day in court and they were deprived of their rights of defending the claim of said Young which was wholly ground-

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less. That under the judgment so fraudulently procured a sale of the premises mentioned in the complaint was had, and upon such sale the defendant Henry Naumann became the purchaser thereof, with notice of these facts, and that afterwards part of said property was conveyed by the said Henry Naumann to some of the other defendants in this action. The complaint therefore prayed for judgment, that the judgment be set aside on the ground that it was procured by fraud, deceit and malpractice, and that all transfers made by the defendant Henry Naumann, by reason of his alleged ownership of the property, be declared vacated, canceled, annulled and of no effect against the plaintiffs.

The other allegations in the complaint are found in the points of counsel for plaintiff.

The attorneys and counsel referred to in the complaint, against whom fraud and conspiracy was charged, are George F. and J. C. Julius Langbein, Louis H. Ronan, Charles Wehle, Henry Wehle, Charles Goldzier, Henry Feuhrer and James W. Hawes.

After the plaintiffs had rested, a motion was made to dismiss the complaint.

George N. Saunders (Kaufmann & Saunders), of counsel for defendant Naumann, in moving to dismiss the complaint made and argued the following points:

I. Plaintiff's remedy (if any) is by ejectment. The complaint seeks to set aside a judgment of partition and sale by the superior court under which defendants acquired their interests in the property in question, upon the ground that the court never acquired any jurisdiction over the parties or of the subject-matter of the action. As to the parties because some of them were infant devisees of the premises in question, and as to the subject-matter because the will provided that the partition should not be made until the youngest child arrived at the age of twenty-one years, which event had not yet happened. These reasons, if sound, are fatal to plain-

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tiff's claim for equitable relief; for, if the judgment is absolutely void upon its face, then it is not even a cloud on plaintiff's title to the premises in question. But whether a cloud or not, plaintiffs being out of possession must be remitted to their remedy to recover possession by the common-law action of ejectment (*Phelps* agt. *Harris*, 101 *U. S. Sup. Ct. Rep.* [11 *Otto*], 370, 375; *Marsh* agt. *City of Brooklyn*, 59 *N. Y.*, 280, 283). The rule upon which the courts interfere to remove a cloud upon title is this: "When the claim or lien purports to affect real estate, and it appears on its face to be valid, or when the defect in it can be made to appear only by extrinsic evidence which will not necessarily appear in proceedings by the claimant thereof to enforce the lien, there is a case presented for invoking the aid of a court of equity to remove the lien which is a 'cloud upon the title'" (*Bosworth* agt. *Vanderwalker*, 53 *N. Y.*, 599; *Krekeler* agt. *Ritter*, 62 *N. Y.*, 372, 375; *Stillwell* agt. *Carpenter*, 59 *N. Y.*, 414, 423; *Phelps* agt. *Harris*, *supra*; *Orton* agt. *Smith*, 18 *How.*, 263; *Ward* agt. *Chamberlain*, 2 *Black.*, 430; *West* agt. *Snebly*, 54 *Ill.*, 533; *Huntington* agt. *Allen*, 44 *Miss.*, 654; *Stark* agt. *Starrs*, 6 *Wall.*, 402; *Overing* agt. *Foote*, 43 *N. Y.*, 290; *Meloy* agt. *Dougherty*, 6 *Miss.*, 269).

II. The superior court had jurisdiction and plaintiffs have no cause of action. Plaintiff's claim of non-jurisdiction as to parties is based upon the following allegations of the complaint: 1st. The petition upon which the order of the court was made appointing a guardian *ad litem* of the infant plaintiffs did not set forth or contain the facts required by law. 2d. The proceedings were had by reference or otherwise to ascertain the truth of the facts set forth in the petition as to the necessity for a partition, as required by law. 3d. No bonds have been given as required by law. There are three complete answers to this — 1st. The allegation is fatally defective in not stating "what facts required by law," if any, were omitted; and the law does not prescribe any reference as alleged. 2d. No petition was required, because plaintiff Struppman was an adult

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and competent to maintain the action of partition under the Revised Statutes as amended by the Code (2 *R. S.* [*Edmond's ed.*], 326; *extended to superior court by section 33 of the Code*; *see, also, section 117 of the old Code*). No reference necessary (*Laws of 1852, chap. 277, sec. 2, p. 411*). 3d. It is not necessary that guardians *ad litem* for infants should give bonds (*Croghan agt. Livingston, 17 N. Y., 218*; *Rogers agt. McLean, 34 N. Y., 536*; *Brainerd agt. Heydrick, 32 How., 97*).

III. If the superior court had jurisdiction over the parties and of the subject-matter of the action, then an erroneous adjudication was only error of law, and, as such, reviewable only by appeal. If the infant be brought within the jurisdiction of the court, the partition is as effectual against him as against an adult, and cannot be avoided for irregularities or errors in the subsequent proceedings (*Freeman & Co., Tenancy and Partition, section 467, p. 574*; *Blakely agt. Calder, 15 N. Y., 617*). The plaintiffs' time to appeal from the superior court judgment has long since expired, and even if it had not then, remedy, if any, is by motion in the superior court, not by bill in this court.

IV. Plaintiff is estopped by retaining the proceeds of the sale without tendering the same back to the purchaser. It is an invariable maxim in law that he who asks equity must do equity; and an equally fixed rule that no one can avoid an executed contract without first surrendering, or offering to surrender, the proceeds obtained. The judgment-contract and the contract of sale under it have been completely executed; the plaintiffs hold, and have not offered to return, the proceeds. This failure of plaintiffs to tender a return of the moneys received by them is an absolute bar to this action (*People's Bank agt. National Bank* [101 *U. S. Supreme Court*], 11 *Otto, 81*; *Wharton on Agency, 89*; *Bigelow on Estoppel, 423*; *Railroad Co. agt. Howard, 7 Wall., 397*; *Kelsey agt. National Bank of Crawford Co., 69 Penn., 425*; *Steamboat Co. agt. McCutcheon, 13 Penn., 13*).

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Charles Strauss, Daniel T. Robertson and Edgar A. Hutchings, for plaintiffs.

Ex-Recorder Smith, of counsel for plaintiffs, contended that the plaintiffs had made out a clear case of fraud and collusion among the attorneys, and that the superior court judgment should be vacated and set aside.

BARRETT, J. — So far as the suit is based upon the want of jurisdiction in the superior court, I have never had any doubt from the commencement that it was not well founded. If the averments of the complaint on that head be true, then these purchasers have taken no title and these infants have not been injured. It would only be necessary for the infants to bring ejectment. The case has been heard through on the theory that there was fraud in fact outside of the record and that the infants were injuriously affected by that fraud. So far as I can glean from the testimony and the arguments of counsel the finger has been put upon but two specific acts of alleged fraud. The first is the conduct of certain parties with respect to Young's tenancies by the courtesy, and the second is with regard to the allowances. All else is innuendo. There is no suggestion that the infants have been otherwise deprived of any of their just rights by this litigation in the superior court. I speak now in a general way.

Certainly the property has been divided according to law. No infant has been given a quarter when he was entitled to a third; no person has been given a fifth when he should have had one-half. The distribution was right and correct. No matter what the court did, it was done in accordance with law and in accordance with the will. Now then, as to Young's tenancy by the courtesy, it is charged in substance that if that claim had been properly and loyally resisted Young would have failed and that the others would consequently have correspondingly benefited. But the first answer to that is, Young is not a party here. Again, these purchasers had nothing to

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do with the conduct of the suit, nor with the Young incident. They purchased the property and paid their money upon the faith of the decree of the superior court. If, in the distribution of that money, some persons are to receive less and others more because of some matter *de hors*, the record of which the purchasers had no notice, surely such purchasers are not responsible.

But are we to set aside even that part of the decree which gave Young his tenancy by the courtesy without hearing him?

There is no one before the court except the purchasers under the decree. It seems as though all the parties to that decree, with the exception of Mr. Langbein, had got together and brought this suit against the purchasers, charging upon their attorneys collusion to bring about an inequitable distribution of the proceeds of the sale. And strangely enough they left out the person (Young) who is most seriously interested. Surely the bare statement of that fact shows that this suit is untenable.

Apart from that, even if Young were a party to the suit, I should be sorry to say there was fraud. There is just that one suspicious circumstance that the suit in the superior court proceeded without Robertson. That may be a disagreeable fact possibly, however susceptible of explanation, but it is not sufficient of itself to justify the court in setting aside this solemn and most elaborate judgment.

Then there is really a great deal to be said upon the other side. This for instance, that even if the supreme suit had not been consolidated, even if it remained to-day in full validity ready to be proceeded with, yet the same as to Young's tenancy by the courtesy could have been properly determined by the superior court. It is true it could have been determined here first if the parties had chosen to proceed to the trial independently in this forum, but I should be sorry to say that their preference for a single trial of all the issues in the superior court, including this of Young's, was conclusive evidence of fraud.

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The guardian *ad litem* for the plaintiff infants in the superior court was the guardian *ad litem* here, and whether there was a consolidation or not the issue as to Young's tenancy was properly tried in that court. When we consider, too, that all the testimony which had been taken here before Mr. justice VAN BRUNT was read before Mr. justice SPEIR, together with such further testimony as we find in the record, it would require most conclusive evidence to justify such a finding against reputable counsel as that they purposely kept testimony back with the view to enable Young unjustly to acquire the tenancy by the courtesy. I am free to say that the evidence upon this present trial falls far short in that respect, and that nothing that has been adduced so far has carried the conviction of fraud to my mind. Some doctors, it is true, have come here and said it was highly improbable that a child should have been born alive under those circumstances, but they do not say it was impossible, and this young woman who testified before in such a way as doubtless to impress the court with the idea that the child was born alive, comes here to-day with another story and says she was present at the birth and that the child was born dead. Her entire testimony to-day is inconsistent with that previously given. Nor is there a particle of evidence that the testimony she gave to-day was within the knowledge of any of the attorneys, even of Mr. Robertson, upon either of the trials before justices VAN BRUNT and SPEIR, nor that anything more could have been elicited from her than was elicited. To justify any interference with the judgment of the superior court, the evidence would have to be very clear, not only that this child was born dead, but that the parties knew it was born dead, and yet collusively and fraudulently arranged by the suppression of evidence or otherwise, to have it decided that it was born alive in order to give Young an improper advantage.

The evidence would have to be very conclusive that as a part of this scheme Robertson was left out. I should find it utterly impossible on this evidence to find these facts or to

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find as an affirmative fact that there was any intention through legal forms to permit Young to obtain an estate to which he was not entitled. So far as the question of Young's right was legally decided, that is, decided jurisdictionally, of course we are not here to review it. We could only act upon clear and conclusive evidence that there was a fraudulent suppression of evidence, which, if produced, would have led to a different result. That case, as I have already said, has not been made out. On the contrary, I am glad to say that, upon the whole, it is my judgment that there was no such fraud. So that whether we look at it in the aspect of Young not being a party to this suit, consequently having no hearing before the court at all, or on the evidence as it stands, assuming him to be before the court, I see no escape from the conclusion that this complaint should be dismissed. And further, is there not ample remedy in the superior court? If these infants have been injuriously affected by the misconduct of the attorneys, if there has been surprise, if newly discovered evidence has been secured, can they not apply to the superior court for a new trial? Is it for us to set aside the entire decree; that which was clearly right as well as that which might be possibly wrong? The superior court can modify its decree, granting a new trial as to Young, and leaving the rest intact, or that court can set the entire decree aside, if of the opinion that such decree was obtained by any misconduct of which it ought to take cognizance. It is apparent that the entire case has never been presented to the superior court, even on a motion. There has been no proper motion to set the decree aside; no motion for a new trial on the ground of newly discovered evidence. All these remedies may yet be invoked on a proper case in the superior court. If that court denies such a motion, that should be the end of it.

Independent of what I have stated of Young not being a party, of the absence of fraud, in fact of the remedy in the other court, there is the additional fact that his suit is against

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innocent purchasers alone. Is the decree to be set aside *as to them* because of a single vicious incident in the proceedings *de hors* the record, and of which they had no notice? Clearly not. The other point is worthy of but little consideration. If this bill was filed on that alone, it would be one of the most frivolous ever filed in a court of justice. The idea that a solemn judgment of a court of competent jurisdiction is to be set aside on account of some irregularity or even impropriety in a minor detail touching a question of costs and allowances, is simply preposterous. And that is really all there is of the case. I am not preparad to find that that decree was obtained by fraud in fact. On the other hand, on the merits **on** this evidence, I shall be compelled to find the opposite.

I am satisfied this case can proceed no further, and must be dismissed on the merits, with costs.

NOTE.— Another action was brought about the same time in the supreme court, wherein Louis C. Muller, an infant, by Leroy B. Crane, his guardian *ad litem*, was plaintiff, and Auguste Wiedersum, Thomas H. Young and others were defendants. The complaint in this action alleged substantially the same facts as to the fraud and collusion between the attorneys as was alleged in the action tried before Mr. justice BARRETT and dismissed by him. In this complaint the following relief was asked:

First. That the judgment of the superior court, so far as it relates to or concerns the alleged interest of the defendant Young or those claiming under or in succession to him, be vacated and set aside upon the following grounds:

1. That upon its face it appears, as to the claims of said Young, to have been unjustly and improvidently made.

2. That the same was procured by fraud and imposition on the court.

3. That the court had no jurisdiction of the subject-matter or of the parties.

4. That the superior court had no power to consolidate an action pending in the supreme court with an action pending in the superior court.

5. That all orders and proceedings had therein based upon "consent" of the attorneys or of the adult Struppmann after his appearance and that of his children by an attorney of record, was illegal and void.

The case was tried before Mr. justice DONOHUE at the June, 1881, equity term, and after the plaintiffs had rested their case, James H. Hawes,

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Esq., and Messrs. George F. Langbein and J. C. Julius Langbein moved to dismiss the complaint and made and argued the following points:

I. If there are any irregularities or mistakes in the judgment the proper remedy is by motion in the court in which the judgment was obtained, or by appeal from that judgment. This court will not sit in review of the superior court judgment. If the judgment is void, then this action cannot be maintained (*Stewart* agt. *Palmer*, 14 *N. Y.*, 183; *Wells* agt. *City of Buffalo*, 80 *N. Y.*, 253).

II. Having charged indiscriminately parties and reputable attorneys with conspiracy and fraud, and having called in question the integrity of the superior court judgment after its rendition, the plaintiff, through his attorneys, has failed to prove any fraud, collusion or conspiracy. He has just been defeated in a similar case only a few days ago in this court after a patient and protracted hearing before Mr. justice BARRETT, where that justice allowed almost incredible latitude of proof.

III. The complaint should be dismissed with costs on the authority of *Smith* agt. *Wilson* (62 *N. Y.*, 286).

Charles Strauss, Daniel T. Robertson and *Edgar A. Hutchings*, for plaintiffs in opposition, contended that a case had been made out on the evidence and proofs.

DONOHUE, J.—No fraud in procuring or entering the judgment complained of is shown, and I do not think that judgment can be reviewed in this action.

Judgment for defendants.

Findings were then signed and judgment entered. That in the procurement of the superior court judgment there was no fraud or imposition practiced upon the parties to that action or upon the court, and that said judgment was not fraudulent and that there were no facts or evidence produced before him to justify the allegations in the complaint or to make a cause of action out of the same. The costs and disbursements were ordered to be paid by Leroy B. Crane, the guardian *ad litem*, personally.

Stern *et al.* agt. Staples.

N. Y. MARINE COURT.

DANIEL M. STERN *et al.*, respondents, agt. ORRIN G. STAPLES,
appellant.

Marine court — Undertaking — Sureties — Before whom they may justify.

The defendant having been ordered to be relieved from a default to file an undertaking conditioned to pay any judgment that might be recovered, with two sureties justified:

Held, that he complied with the order by filing an undertaking justified before the county judge of Jefferson county, the county of their and the defendant's residence.

Every justification made before the county judge of the parties' residence is good.

General Term, October, 1881.

Before SHEA, Ch. J., NEHRBAS and GOEPP, JJ.

THIS appeal was brought from two several orders made by justice JAMES B. SHERIDAN on the 16th and 22d days of June, 1881, respectively; the first denied defendant's motion to open his default, with ten dollars costs; the second denied defendant's motion to vacate and set aside the first mentioned order, with ten dollars additional costs, and vacating and setting aside the stay of proceedings granted in the action. A summons and complaint were served on the defendant personally, in the city of New York, on the 26th day of April, 1881, the defendant at that time being a resident of the city of Watertown, Jefferson county, and casually in the city of New York, who, on his return home, handed the papers to Dennis O'Brien, Esq., his attorney, with instructions to appear and defend the action. By a misapprehension, the attorney supposing the action to be in the supreme court, omitted to appear or answer in time, and judgment was docketed against the defendant by default May 3, 1881.

A motion was then made for leave to appear in and defend said action, and the same was denied by Mr. justice NEHRBAS, "with ten dollars costs to plaintiffs, unless said defendant,

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within ten days from the date of the order, pay to the plaintiff's attorney ten dollars costs of that motion, and filed with the clerk of said court an undertaking in the penalty of two hundred and fifty dollars, with two sufficient sureties, conditioned for the payment of any judgment that might be recovered by said plaintiffs in this action ;" and the sureties upon said undertaking were thereby required to justify within two days after service thereof. A copy of said undertaking, with notice of filing, was served upon the plaintiffs' attorney June 11, 1881, the same being within said ten days ; also a notice that the sureties in said undertaking would appear before the county judge of Jefferson county, at his chambers in the city of Watertown, on Monday, the 13th of June, 1881, at 4 P. M. of that day, to justify under and in pursuance of the terms of the order. The ten dollars costs required to be paid by said order were duly paid to plaintiffs' attorney ; but though said attorney accepted the costs he insisted the sureties must justify before a judge of the marine court of the city of New York ; and to compel such justification in said city of New York he obtained an order from said justice SHERIDAN restraining the defendant from justifying under the notice served in accordance with the terms of said order, and to show cause why plaintiffs should not enter an order denying defendant's motion to open his default. No one appearing to oppose this motion on behalf of defendant, the plaintiffs' attorney took an order denying defendant's motion to open his default with ten dollars further costs against him. After the entry of this order, and on June 17, 1881, defendant procured an order to show cause why the order of June sixteenth should not be vacated as *irregularly entered*, which was denied by justice SHERIDAN, with ten dollars further costs, and the stay of plaintiffs' proceedings vacated.

Anson B. Moore and *H. M. Haigh*, for defendant and appellant.

D. P. Hays, for plaintiffs and respondents.

Stern *et al.* agt. Staples.

SHEA, C. J. — The orders appealed from are reversed, with costs, and the defendant is at liberty to proceed with the justification of sureties before the county judge of Jefferson county (*Seed agt. Teale*, 2 *N. Y. Weekly Dig.*, 545; *McADAM, J.*), or, as the defendant may be advised, under the other provisions of the Code, upon five days' previous notice by mail or personally to the attorney for the plaintiffs.

GOEPP, J. — The defendant having been ordered to be relieved from a default, in supposing a summons to be returnable in twenty days, instead of six, to file an undertaking conditioned to pay any judgment that might be recovered, with two sureties justified, complied with the order by filing an undertaking justified before the county judge of Jefferson county, the county of their and of the defendant's residence. The order rejects the undertaking because not justified before a justice of the court in New York. By rule 5, every justification made before the county judge of the parties' residence is good.

The forms of the supreme court shall be applicable to the marine court (*McAdam's Marine Court Practice*, sec. 40, page 293; *Id.*, page 228).

The sureties on an undertaking given to discharge an attachment in the marine court may justify before a county judge of the county in which they reside (*Seed agt. Teale*, 2 *W. D.*, 545).

The orders appealed from are reversed, with costs and disbursements of the appeal to the appellant.

The People agt. Whitwell.

N. Y. COMMON PLEAS.

THE PEOPLE agt. WHITWELL.

Amendment — Demurrer — Answer — right of defendant to amend demurrer by answer.

A defendant who has demurred, but has not allowed his time to amend of course to pass, has a right to withdraw his demurrer and serve an answer instead, without leave of the court.

In such case the answer must be regarded as an amendment of the demurrer.

Special Term, January, 1882.

VAN HOESSEN, J.—I have heard the case of *Robertson* agt. *Bennett* (1 Abb. N. C., 476) very severely criticised by lawyers, and yet I think that the decision is right. It strikes every man, at first blush, that a substitute is a very different thing from an amendment. Every one familiar with legislative proceedings knows the settled distinction between an amendment to a bill and a substitute for a bill. An amendment is, in its original meaning, the removal of a spot or stain. In our use of the word an amendment is the correction of an error. In practice it makes very little difference whether an amendment may be made of course, or whether leave to make it shall first be obtained from the court. No one will question the power of the court to allow an answer to be substituted for a demurrer, and it would not seriously embarrass the courts if it should be found that the legislature has authorized a party to make such a substitution of his own free will, provided that he does so in good faith and within the time permitted for amendments of course. Long before the Code was ever thought of, amendments of course were allowed by the courts of this state as they were allowed in England. In *Tidd's Practice* (page 766) the law is thus stated: "After a demurrer the courts would not formerly have permitted an amendment to be made without the consent of the adverse party,

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but of late years they have not observed this strictness, and it is much better for parties that they should not. Hence, it is now settled that after a demurrer, or joinder in demurrer, either party is at liberty to amend, as a matter of course, whilst the proceedings are in paper. Indeed, the very intent of requiring mistakes in form to be shown for cause of demurrer, was to give the party an opportunity of amending." In the state of New York the allowance of amendments, of course, was governed before the Code by Rule 23 of the supreme court. That rule was in the following words: "The plaintiff may, at any time before default for not replying shall be entered, if the plea shall be a special plea, or a plea in abatement, or within twenty days after service of a copy of the plea, if it shall be the general issue, amend his declaration. After plea either party may, before default for not answering shall be entered, amend the pleading to be answered; and where there shall be a demurrer to a declaration or other pleading, such pleading may be amended at any time before the default for not joining in demurrer shall be entered. The respective parties may amend under this rule of course, and without costs, but shall not be entitled so to amend more than once. The defendant shall not amend a plea under this rule, unless his attorney shall make and serve an affidavit that he verily believes the plea to be true in point of fact, and that it was pleaded in the belief that it contained a good answer to the action in form and substance."

In *Bleecker agt. Bellinger* (11 *Wend.*, 179) the defendant demurred to the declaration, and within twenty days thereafter entered a rule to amend of course, and served a plea, which the plaintiff moved to set aside. The court, in granting the motion, said that the rule permitted an amendment after plea, not after demurrer; and that the rule permitted an amendment only where a default may be entered for not answering, and that such a default could not be entered where a demurrer had been interposed, and consequently that the right to amend of course did not exist where a demurrer had been filed.

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Now, the first comment to be made on that decision is, that it is pregnant with the implication that but for the phraseology of the rule the amendment would have been allowed to stand. The court evidently did not regard it as any objection that the original pleading was a demurrer, and that the proposed amendment was a plea. Had they so considered it, it would not have been necessary to found their decision on a strict construction of the rule rather than upon the broad ground that a plea was a pleading of an entirely different class from a demurrer requiring a different kind of trial, and that as it did not correct any errors in the demurrer, it could not properly be said to be an amendment. The language of the rule, and that alone, prevented the court from accepting the plea as an amendment of the demurrer. Under the Code we are not hampered by the narrowness of the provision respecting amendments. All pleadings stand upon a level. Why, then, should a party be worse off if he discovers that his demurrer is bad than he would on discovering the insufficiency of his complaint or his answer? There is scarcely a limit to the power of amending other pleadings (*See Brown agt. Leigh*, 49 N. Y., 78). Why should the rule be more rigid respecting demurrers? A demurrer is only a pleading, and if the pleader admits it to be bad, why should he not be permitted to withdraw it exactly as he could withdraw any other pleading? If bad faith be discovered, the Code provides a remedy. The effect of an amendment is to withdraw from the case the pleading which is amended. The pleading which is amended at once retires and makes room for the perfected pleading. It may fairly be said that there can be no amendment without the withdrawal of a pleading. When a pleading has been withdrawn, it no longer incumbers the record or embarrasses the adverse party. If the withdrawal be within the time prescribed by the Code, certainly the adverse party ought not complain because he has got rid of a bad pleading in accordance with law, and without an argument.

The language of the Code is broad enough to sanction

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changes in substance as well as changes in form, and there is no reason, not even a technical one, for holding that the Code does not allow an answer to take the place of a demurrer, without leave of the court, unless he violates some provision of law, a party acting in good faith may change his pleading to suit himself at any time within the twenty days that follow the service of his pleading (*Brown agt. Leigh*, 49 N. Y., 78.)

The answer must stand, but as the question is comparatively new I will not allow costs against the plaintiff.

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SUPREME COURT.

THE SUPREME COUNCIL OF THE ORDER OF CHOSEN FRIENDS
agt. CHARLES G. FAIRMAN, superintendent of the insurance department.

Associations — Voluntary or incorporated — When amenable to chapter 256 of Laws of 1881, and not to the general insurance statutes of the state — Injunction — When and to what extent may be invoked against a state officer.

The plaintiff is a corporation duly organized and formed under the laws of the state of Indiana, and its legal location is in the city of Indianapolis in said state. It commenced business in this state October 2, 1880, eight months previous to the adoption of chapter 256 of the Laws of 1881. Among the objects of the plaintiff's organization is the establishment of a "relief fund from which members of this association who have complied with all its rules and regulations may receive a benefit on a sum not exceeding three thousand dollars, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled, or upon his death." The resources of the plaintiff are derived entirely from voluntary donations and admission fees, dues and assessments from members and the interest thereon. The plaintiff claims the right to do business in this state, and seeks to enjoin the defendant, the superintendent of insurance, from interfering in any way with its operations, insisting that he has wantonly and maliciously sought to interrupt its operations and business :

Held, that the plaintiff is amenable to the Laws of 1881 and not to the general insurance statutes of the state, and that the article of its by-laws

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which provides for the payment of a benefit to a member upon his attaining the age of seventy-five years, is one rendered proper by the occurrence of a physical disability of a member within the true intent and meaning of these words as used in the act aforesaid.

Held, also, that as the plaintiff has complied with all the requirements of the act of 1881, it is entitled to carry on its operations in this state unmolested by any improper interference from the defendant or any other person.

Held, further, that it is not the office of an injunction nor the prerogative of the court to dictate to an officer of the state his views as to the proper construction of a law. He can only be compelled to do what the law commands him to do, or be restrained from doing an act to another's injury which he has no power to do, but he cannot, by injunction, be prevented from expressing in a lawful and proper manner his views of the legality of a business when he is actuated by no malice or evil intent.

Special Term, December, 1881.

Winfield, Leeds & Morse, for plaintiffs:

I. The court has a right to interfere by injunction to restrain a public officer, when the plaintiff can show a clear, legal and equitable right to relief, where the defendant has done or committed, or has threatened to do some act which will be destructive of plaintiff's rights, or which has caused or is about to cause material injury to the plaintiff. In every such case courts of equity will interfere by injunction in furtherance of justice and the violated rights of the party (*Story on Equity*, sec. 955, a; *People* agt. *Canal Board*, 55 *N. Y.*, 390; *Lutes* agt. *Briggs*, 5 *Hun*, 67; *Tribune Assoc.* agt. *Sun Print. and Pub. Co.*, 7 *Hun*, 175; *Deidricks* agt. *North Western R. R. Co.*, 33 *Wis.*, 33; *Beatty* agt. *Kurtz*, 2 *Peters*, 566; *Ogden* agt. *Gibbons*, 4 *John's Ch.*, 150; *Livingston* agt. *Ogden*, 4 *John's Ch.*, 48; *Cromwell* agt. *Stevens*, 2 *Daly*, 15). The courts will interfere not only upon the information of the attorney-general, but also upon the application of private parties, where it is sought to prevent irreparable mischief or to suppress multiplicity of suits and oppressive litigation (*Story on Equity*, secs. 924, 928; *Knox* agt. *The Mayor*, 55 *Barb.*, 404).

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II. The plaintiff having shown that the conduct and acts of the defendant have actually resulted in damage to the plaintiff; that the nature and character of the injury arising from the defendant's acts and conduct are such as to preclude an accurate or correct estimate of the extent or measure of the damage, the case for the plaintiff is clearly established, and its right to an injunction is fully made out. If there is any law or authority to justify the acts of the defendant, the burden is on him to show it (*Underwood* agt. *Green*, 42 *N. Y.*, 140; *Tribune Assoc.* agt. *The Sun*, 7 *Hun*, 175).

III. The defendant, since he can define no legal authority for his action, must stand before the court simply as an individual, and his conduct in defaming the legal character of the plaintiff's action which impairs its powers and operations are analogous to a slander of title (*Snow* agt. *Judson*, 38 *Barb.*, 210; *Benton* agt. *Pratt*, 2 *Wend.*, 385; *White* agt. *Merritt*, 7 *N. Y.*, 352; *Gallagher* agt. *Brunnell*, 6 *Cow.*, 346).

Andrew S. Draper, for defendant.

WESTBROOK, *J.* — The plaintiff is a corporation duly organized and formed under the laws of the state of Indiana, and its legal location is in the city of Indianapolis in said state.

It commenced the transaction of business in this state on the 2d day of October, 1880, and had been transacting business therein for a period of eight months when chapter 256 of the Laws of 1881 was adopted.

The objects of the plaintiff's organization, as stated in the complaint, are "to unite in bonds of fraternity, aid and protection, all acceptable white persons of good character, steady habits, sound bodily health and reputable calling, who believe in a supreme intelligent being, the creator and preserver of the universe; to improve the condition of its membership, morally, socially and materially by timely counsel and instructive lessons, by encouragement in business and by assistance to obtain employment when in need; to establish a relief fund

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from which members of this association, who have complied with all its rules and regulations, or persons by such members lawfully designated, or the legal heirs of such members, may receive a benefit on a sum not exceeding three thousand dollars, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled from following his usual or some other occupation, or upon the satisfactory evidence of the death of such member, and when all the conditions regulating such payment have been complied with."

The resources of the plaintiff are derived entirely from voluntary donations, admission fees, dues and assessments from members and the interest thereon.

As to the objects of the plaintiff's organization and the source of its revenues, and the time when it commenced business in this state there is no dispute, and claiming the right to do business therein, the plaintiff seeks to enjoin the defendant from interfering in any way with its operations, insisting that he has wantonly and maliciously sought to interrupt such operations and business. The defendant claims, as one defense to the motion, that the plaintiff's agreement to pay to a member, his heirs or beneficiary, the sum of \$3,000 upon such member attaining the age of seventy-five years, subjects it to the general insurance law of the state, and therefore it cannot transact business therein without complying with such general insurance statutes. The first question, therefore, which this motion presents is, does chapter 256 of the Laws of 1881 make the general insurance laws inapplicable to the plaintiff?

The act to which reference has just been made by its first section provided that "all associations and societies, whether voluntary or incorporated under the laws of this state, or any other state or territory of the United States, or of the District of Columbia, doing business in this state, which hereafter have or hereafter may issue any certificate to, or have made or may make any promise or agreement with their members

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whereby, upon the decease or sickness *or other physical disability* of a member, any money or other benefit, charity, relief or aid is to be paid, provided or rendered to such member or to others dependent upon him, or beneficiary designated by him, which money, benefit, charity, relief or aid are derived from voluntary donations or from admission fees, dues and assessments collected or to be collected from the members thereof, and interest and accretions thereon, and which funds and the business operations of which associations and incorporations are limited to such benevolent or charitable uses *shall be subject only to the provisions of this act* as hereinafter specified."

It will be observed from the language of the law just given, and from the nature and character of its business and the source of its revenue, in regard to which there is no contest, that the plaintiff is clearly subject to the act of 1881, and not to the general insurance law of the state, provided that the attainment of seventy-five years of age by a member is a "physical disability" within the true intent and meaning of that statute.

That old age causes "physical disability" is a fact which our senses continually attest. These mortal bodies are certain to fail by the lapse of years alone, though sickness, disease or accident do not visit them.

There is a period too which human experience has fixed as the time when the vital forces are lessened and when "physical disability," to a certain extent, at least, must surely be present.

The Psalmist says "the days of our years are three score years and ten," and while he admits what our observation has also discovered that the number of those days may in exceptional cases be increased, yet both the constitutional and statute law of the state recognize the fact that at seventy years of age physical infirmity and disability are present (*art. 6, sec. 13 of state Const.*; 1 *R. S.* [6th ed.], 388, *sec. 6*), and in so doing they have but expressed our own consciousness.

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The extent of the "physical disability," upon the existence of which a corporation or association of the character of the plaintiff may undertake to pay benefits without placing itself beyond the pale of the act of 1881, is not stated therein. A "physical disability" may be great or small to the degree of complete prostration, or of partial only; but so long as it exists as a fact, and is really present disabling a person either entirely or partially from pursuing the active duties and business of life, then an agreement by the plaintiff, or any similar association or corporation to pay to a member, or to his family or to a beneficiary designated by him, a benefit, when he has thus become completely or partially disabled, is lawful under the act of 1881, without any compliance with the general insurance law. Has the plaintiff undertaken to do any more than this? It simply agrees to pay a specified sum when a member attains seventy-five years of age, or when by disease or accident he is prevented from following any occupation, or upon his death. In other words the plaintiff, recognizing the fact that "physical disability" must come to a member by age alone, though he be exempted from disease and accident, and that uncertainty might exist as to its actual presence unless a specific time was fixed when it should be deemed to be present, has declared that the arrival of the age of seventy-five years — a period of life five years beyond the allotted days of man, and the period of his usefulness to the state in a judicial capacity — shall be deemed a "physical disability," which shall entitle a member to a benefit, from a relief fund, which he has helped to create. As in fact and in truth, in every case where a person reaches the age of seventy-five years, "physical disability," greater or less, must be present, the undertaking of the plaintiff is not different from one depending upon the coming of physical infirmities by reason of age. The contracts, it makes, simply remove all uncertainty by the specification of a time, upon the arrival of which "physical disability" shall be deemed to be present, and which time is one that not only divine and human laws, but

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our experience as well, recognize as a period of life when it is certain to be present, though in some instances its presence is less clearly manifested than in others.

For the reasons which have been stated I am forced to the conclusion that the plaintiff is amenable to the law of 1881, and not to the general insurance statutes of the State; and that the article of its by-laws which provides for the payment of a benefit to a member upon his attaining the age of seventy-five years, is one rendered proper by the occurrence of an "other physical disability" of a member, within the true intent and meaning of those words, as used in the act aforesaid.

Before proceeding to the discussion of the second question which this motion involves, it should be stated that section 4 of chapter 256 of the Laws of 1881, is not applicable to the plaintiff. That section excepts from its operations, associations and societies, which "are now doing business within this state," and as the plaintiff had been doing business within this state for eight months when the law was enacted, it required no certificate of authority so to do from the superintendent of insurance as is by such section required from companies which, subsequently to the passage of the law, undertake to do business within this commonwealth. As the plaintiff has complied with all the requirements of the act of 1881 (this is assumed because not questioned), it is clearly entitled to carry on its operations in this state, unmolested by any improper interference from the defendant or any other person, and this brings us to the inquiry: Has the defendant improperly and unlawfully sought to injure the plaintiff in its business?

The complaint proceeds upon the theory that the defendant as superintendent of insurance has improperly written to parties to dissuade them from uniting with any of the plaintiff's branches in this state, threatening them with legal penalties in case of their becoming members, and has thus seriously injured the plaintiff in its business. If this had been wantonly and maliciously done, as the complaint charges,

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the plaintiff would be entitled to the injunction it seeks to restrain such conduct. The defendant is, however, a high officer of the state to whom such conduct should not be attributed, except upon the clearest proof. He emphatically denies any such interference as has been imputed to him by the plaintiff, and shows by much detail of statement, the times and occasions when he has expressed an opinion of the plaintiff and its business.

All these utterances, whether spoken or written, were made when he was officially interrogated and were evidently promulgated in good faith. It is not the office of an injunction nor the prerogative of this court to dictate to an officer of the state his views as to the proper construction of a law. He can only be compelled to do what the law commands him to do, or be restrained from doing an act to another's injury which he has no power to do, but he cannot by injunction be prevented from expressing in a lawful and proper manner his views of the legality of a business when he is actuated by no malice or evil intent. Upon the allegations of the defendant's answering papers the preliminary injunction asked for must be refused. A trial of the action, which will more perfectly develop the case, will enable the court to proceed with more certainty. As, however, our construction of the act of 1881 differs wholly from that of the defendant, no costs upon the denial of this motion will be given, but they will abide the final determination of the suit.

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N. Y. SUPERIOR COURT.

WILLIAM B. PARKER agt. RICHARD C. SPEAR.

Imprisonment for debt — Attorney's lien for costs — Right of attorney for a defendant to imprison plaintiff to collect his costs — Code of Civil Procedure, sections 66, 549, 1487.

Under the Code of Civil Procedure in an action in which the defendant is liable to arrest, and in which the plaintiff is unsuccessful in his suit, the latter may be arrested and imprisoned by the defendant's attorney on a claim for costs.

And this is true, although the plaintiff did not exercise his right to arrest the defendant, and although he may have a perfectly good case, but loses his suit on a mere technicality.

Special Term, February, 1882.

MOTION to vacate execution against the person.

Charles Strauss, for plaintiff, for motion.

Jacob Fromme, for defendant, in opposition.

ARNOUX, J. — Under the old Code an attorney was regarded as the equitable assignee of the judgment to the extent of his claim for services. The payment thereof he had a right to enforce by execution, if he had a lien (*Haight agt. Holcomb*, 16 *How.*, 160). If the judgment were for costs, that carried notice of itself on the attorney's lien, and payment to the party was wrongful (*McGregor agt. Comstock*, 28 *N. Y.*, 237; *Marshall agt. Meech*, 51 *N. Y.*, 140).

Even where a judgment had not been obtained, a settlement between the parties without notice was not permitted to deprive the attorney of his right to collect costs (*Rasquin agt. Knickerbocker Stage Co.*, 21 *How.*, 293; *Dietz agt. McCallum*, 44 *How.*, 494, and cases cited).

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The new Code embodied the previous decisions in section 66, and made the existence of the relation of attorney and client statutory notice of the attorney's rights, and gave him a lien for its compensation.

In this case it is conceded by the parties that if the plaintiff had succeeded in his cause of action, he would have the right to enforce the collection of his recovery by issuing an execution against the person of the defendant. In such a case it has been held that where the plaintiff fails, he himself is liable to an execution against his person, although the defendant was not in fact arrested nor attempted to be arrested (*Kloppenbergt. Neefus*, 6 *Supr. Ct. R.* [4 *Sandf.*], 655).

The case of *Catlin agt. Adirondack Company* (81 *N. Y.*, 639, reversing 27 *Supreme Ct.* [20 *Hun*], 19) is an instructive case on this question, and affords an excellent illustration of the law as it now stands. The plaintiff brought his action against defendant, a common carrier, for loss of property amounting to \$400. The cause was referred, and on the referee's report judgment was entered in plaintiff's favor. On account of errors in the trial the judgment was reversed and a new trial ordered. At that time it was not universally understood that such a reversal continued the cause before the same referee, and the plaintiff refused to appear on notice before the original referee, who thereupon dismissed the complaint. The attorney for plaintiff, instead of applying to the court for relief, stood upon what he supposed to be his legal rights and was beaten. The result was that the plaintiff was by a technicality defeated in his action with a judgment of more than \$500 costs against him. Defendant then issued an execution therefor, which was returned unsatisfied, and thereupon a second execution was issued against the person. This was set aside by the court of appeals only because the complaint was construed to state a cause of action in contract and not in tort. Of the real merits of this controversy of course we cannot speak; but assuming that plaintiff had a clear

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right of recovery if he had framed his complaint in the ordinary form, he would have lost his property, and then been sent to jail until he had paid \$500 for the privilege of suing. And in this case cited, as the defendant was a corporation, if plaintiff had recovered he could not have arrested anybody.

It necessarily follows, from the above authorities, that as the action was one in which the defendant could have been arrested, the attorney for the defendant has the right to imprison the plaintiff to collect his costs.

We are proud of our legislation abolishing imprisonment for debt; and our statutes on that subject mark an epoch in the history of the liberty of the citizen. It is difficult to imagine a more outrageous case of unjust exception to that law than the case at bar. Here a plaintiff seeking redress for a wrong — a wrong it may be that compelled him to frame his complaint in tort — is beaten; how or why, the papers do not disclose. The defendant consents to relieve him from all costs, and then the attorney steps in and not only says this cannot be done, but “I will imprison this plaintiff if he does not pay my costs.” The plaintiff and defendant’s attorney are strangers; have never contracted with each other, have never wronged each other, and yet this attorney in defiance of the wishes of all other parties concerned can issue this process. Nothing of the kind can be done in England, for it has there been expressly held that the attorney has no lien upon the body of the judgment debtor for his costs (*Martin agt. Francis*, 1 *Chit.*, 241; *Man agt. Smith*, 4 *Barn. and Add.*, 466), and I trust that this anomaly will be rectified here. The legislature, in my opinion, ought immediately to amend the Code so that no execution against the body should be issued for costs only.

The arguments against this have not, to my mind, even the merit of speciousness. They are simply the reiteration of old proverbs that those who take the sword should perish by the sword.

But the judiciary have no power to make the law. They

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must administer it as they find it, and trust to an enlightened public sentiment to repeal, alter or modify oppressive laws.

I am with great reluctance constrained to deny the motion.

NOTE.— We cheerfully call attention to the remarks of the judge at the close of the foregoing opinion, and fully endorse his criticism of the provision of the Code of Civil Procedure referred to, and trust his suggestion as to amending the same “so that no execution against the body should be allowed to issue for costs only,” may be heeded by our present legislature. Imprisonment for debt is a relic of barbarism, and although in the few cases in which it is retained in this state, its object is mainly to force the payment of debts by dishonest and fraudulent debtors, the power is oftener abused for purposes of persecution than it is fairly used for legitimate ends.—[Ed.]

SUPREME COURT.

GEORGE WEYH agt. FELIX BOYLAN and others.

Mortgage foreclosure — Conveyance of mortgaged premises by mortgagor after lis pendens filed — Mortgagor dies during pendency of action — Against whom should action be revived — Code of Civil Procedure, secs. 765-1661.

Where an action was commenced by A. against B. to foreclose a mortgage, and, after *lis pendens* filed, B. conveyed the premises to C., and there after B. died and C. was made administrator of B., the action was revived and continued against C., as administrator, and a decree of foreclosure and sale was entered:

Held, that the action was properly revived. Under section 1671 of the Code of Civil Procedure, C., as a grantee subsequent to the filing of the *lis pendens*, is bound by all the proceedings in the action to the same extent as if he were a party and his equity of redemption was cut off by the decree.

Whether a judgment *in personam* for deficiency could be entered against C., *quære*?

Special Term, February, 1882.

THIS motion is made for the purpose of compelling the purchaser to complete his purchase on the sale under the decree entered in this action.

Weyh agt. Boylan.

The facts in the case are as follows :

In April, 1878, this action was commenced by the plaintiff against the defendant, Felix Boylan and others, to forelose a mortgage upon the premises described in the decree in this action. A *lis pendens* in said action was duly filed in the office of the clerk of the city and county of New York. At that time Felix Boylan was the owner in fee of the premises. An answer was put in by said defendant Boylan, and the cause tried November 11, 1878, before Mr. Justice VAN BRUNT, and a judgment was thereafter entered dismissing the plaintiff's complaint. An appeal was taken by the plaintiff from this judgment, and pending such appeal, and before argument at the general term, on the 2d day of July, 1879, the defendant, Felix Boylan, duly conveyed the premises to one Michael S. Boylan.

Pending the appeal, and before the argument, and after the conveyance above, Felix Boylan, the defendant, died; his death occurred September 2, 1879. On the 27th day of October, 1879, an order was made reviving this action against Michael S. Boylan, the administrator of the goods, chattels and credits of Felix Boylan, deceased. The appeal from the judgment dismissing the complaint was argued in January, 1880, and the judgment of the special term affirmed.

From this judgment of affirmance an appeal was taken by the plaintiff to the court of appeals, which appeal was argued May 9, 1881, and the judgment of the special term and general term reversed, and a new trial was ordered.

All these facts appear by the papers on the case and the judgment.

The cause was tried in 1881, and a judgment of foreclosure and sale entered.

Outside of the judgment roll appears the fact that it is very doubtful if Michael S. Boylan, the administrator of Felix Boylan, deceased, was living when the cause was tried in 1881, or when it was argued in the court of appeals in May, 1881.

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Townsend & Mahan, for purchaser.

I. The court will not compel a purchaser to accept a doubtful title. A purchaser on a partition or foreclosure sale has a right to expect that he will acquire a good title. He should not be left to the uncertainty of a doubtful title, or the hazard of a contest with other parties which may seriously affect the value of the property if he desires to sell it (*Jordan agt. Poillon et al.*, 77 N. Y., 519, 521).

II. This action was originally commenced against Felix Boylan the mortgagor and owner of the fee during his lifetime, and a notice of *lis pendens* was duly filed. After a judgment in his favor, and pending an appeal by the plaintiff from such judgment, he conveyed the premises to Michael S. Boylan. Before argument of the appeal from such judgment Felix Boylan, the original defendant, dies. The question now arises whom should this action be revived against? The plaintiff assumed that it should be revived against the administrator of the goods, chattels and credits of Felix Boylan, deceased, and not against his successors in interest. This, it is claimed by the purchaser at the sale, is erroneous, for the reason that the administrator is not the successor in interest of the defendant. The fee of the land did not vest in the administrator, and the order of revival against him was a nullity, except as enabling the plaintiff to enter a judgment for deficiency against the estate of Felix Boylan, deceased.

III. The Code prescribes that no action shall abate by the death of a party, but that the same may be revived against the personal representatives or successor in interest if the cause of action survive. In this case the action being one *in rem*, did not the action survive against the successor in interest, and should not the revival have been against him?

IV. The judgment entered in this action is against Felix Boylan, the deceased, and Michael S. Boylan, his administrator. The difficulty is that inasmuch as Felix Boylan died before the trial of this action, upon which the judgment was entered, such

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judgment against him is utterly and entirely invalid and absolutely void (*see Code, sec. 765*), and therefore as far as the judgment is in form against him, it is no judgment, and there being no judgment against the person who was the owner of the fee at the time of the commencement of the action, it follows that there is no judgment in existence which could cut off his grantee.

V. When order of revival was made should it not have been upon a supplemental complaint? If this was necessary there was none in this case.

VI. It having been impossible, after the death of Felix Boylan, to have entered any valid judgment against him, it was necessary to have had, from the time of the death of Felix Boylan, the person who succeeded to his interest in the estate before the court before any judgment cutting off his right of redemption could have been entered. In other words, if Felix Boylan had lived, a judgment of foreclosure would have cut off Michael S. Boylan, who succeeded to his ownership of the fee after the filing of the *lis pendens*; but Felix dying before the trial it was necessary from that time to have before the court the person succeeding to his interest.

VII. It may be claimed that Michael S. Boylan being made a defendant, as administrator, &c., was before the court. This did not bring him before the court in his individual capacity. He was brought in specifically as the representative of the goods, chattels and credits of the deceased, not as the owner of, nor having any interest in the fee, but merely for the purpose of obtaining a judgment for deficiency against the estate of the deceased. Any judgment against him as administrator in no way cuts off his right as the individual owner of the fee to redeem.

VIII. From the affidavit submitted, relative to Michael S. Boylan the administrator, it is very doubtful if said administrator was living at the time of the trial of this action, or of the entry of the judgment therein.

IX. As the law stood before the Code, it is expressly held

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in Story's Equity Pleadings (*section 329*), that if a change of litigation is occasioned by or in consequence of the death of a party whose interest is not determined by his death * * * the proceedings become abated or discontinued either in part or in the whole. For as far as the interest of a party dying extends there is no longer any person before the court by whom or against whom the suit can be prosecuted. Again by *section 354 (Id.)*, the death * * * of one of the original parties is the most common, if not the sole cause of the abatement of a suit in equity. As the interest of a plaintiff usually extends to the whole suit, therefore in general from the death of a plaintiff all proceedings become abated. * * * Upon death of the defendant likewise all proceeding become abated as to that defendant. Under *section 354 a*, a bill of revivor, properly so-called, lies only by or against the persons who are the proper representatives of a deceased party. If the suit respects the personal assets of the deceased party, his executor or administrator is the only proper party by or against whom the revivor is to be. If the suit respects the real estate of the deceased party, his heirs are the proper parties. And this same doctrine is held through the whole chapter as to supplemental bills (*Chapter 8, bills not original*), the very gist of the whole doctrine being that a change of interest from a living defendant to a living party, leaves the subject of litigation in equity still before the court; but if the party whose interest is affected is not living at the time of the trial of the action, then the action absolutely abates and must be revived by supplemental bill against the party who succeeds to the interest of the deceased; if personal property, then against his administrator; if realty, then against his heirs or assigns. In other words, there must be a living party at the time of the trial who represents the equity of redemption. The exact point both by the Code and by *section 366*, Story's Equity Pleadings, and by all the decisions running through the cases in this state, is that where a decree has been signed and enrolled, or even where a trial has been had,

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judgment may be entered and enforced in form against the deceased party, but always remains the principle that if a party dies before trial, his successor in interest must at the time of the trial be before the court. An order should be entered discharging the purchaser, and directing the repayment of the ten per cent by the referee, and out of any proceeds on a resale of the auctioneer's fees and expenses of search.

L. P. Kirchies and *Jacob A. Gross*, for plaintiff.

I. It is not denied that when the complaint and *lis pendens* were originally filed all necessary parties were joined and brought before the court.

II. The defendant, Felix Boylan, having parted with his interest *pendente lite*, his heirs were not on his death either necessary or proper parties. The action could only be continued as against his personal representatives, and this was done.

III. Michael S. Boylan, the purchaser of the equity, was also the administrator of the estate of Felix Boylan, deceased. The action was continued as against him and he appeared by attorney. The fact that he is called administrator, &c., does not alter this. Having been brought before the court, jurisdiction was acquired over him in every capacity in which he might have an interest in or claim to the mortgaged premises.

IV. But it was not necessary to continue the action as against the grantee of Felix Boylan at all. He came in after the filing of the *lis pendens*, and was bound by all proceedings taken in the action to the same extent as if he was a party to the action (*Code of Civil Pro.*, secs. 1670, 1671).

V. The effect of the conveyance upon this sale is declared by section 1632. It is an entire bar against each party to the action who was duly summoned and every person claiming from, through or under a party by title accruing after the filing of the notice.

VI. The Code has merely enacted a well established maxim of equity jurisprudence (*Story's Eq.*, secs. 405, 406, 409).

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VII. The authorities under the old Code uniformly held in accordance with the doctrine of equity that the decree entered in the suit binds the purchasers (*Cleveland* agt. *Boerum*, 24 *N. Y.*, 610; *affirming S. C.*, 27 *Barb.*, 252; *Harrington* agt. *Slade*, 22 *Bosw.*, 162; *Griswold* agt. *Miller*, 15 *id.*, 520; *Zeiter* agt. *Bowman*, 6 *id.*, 133; *People* agt. *Connelly*, 8 *Abb. Pr.*, 128; *Chapman* agt. *West*, 17 *N. Y.*, 125; *affirming S. C.*, 10 *How.*, 367).

VIII. Not only the parties, but also all in privity with them are bound (*Craig* agt. *Ward*, 1 *Abb. Ct. App. Dec.*, 454; *Fuller* agt. *Scribner*, 76 *N. Y.*, 190).

IX. The provisions of the Code prescribing the proceedings in an action after death of a party defendant have no application to actions of foreclosure so far as such actions are proceedings *in rem*. If at the time of filing the *lis pendens* all parties are properly before the court, no subsequent event, whether the act of the parties or otherwise, can interfere with the right of the plaintiff to proceed. A perfect title to the property can be conveyed. Whether a judgment *in personam* for deficiency can be entered is a question which does not arise here. The objection made to the title is without force and the purchaser should be compelled to take or consent to a resale.

BARRETT, J. — The only question is whether Michael S. Boylan's equity of redemption was cut off by the decree. It is conceded that it would have been cut off had his grantor, Felix Boylan, lived. The claim is that because of Felix's death *pendente lite*, the equity could be cut off only by making Michael a party. I am unable to perceive why this incident should affect the question. Under section 1671 of the Code, Michael, as a grantee subsequent to the filing of the *lis pendens*, is bound by all proceedings in the action to the same extent as if he were a party. The purchaser would read this section as though the words "unless his grantor shall die before judgment" were added. Felix's heirs cannot com-

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plain, as the equity had been conveyed; nor can the grantee, for the reason above stated. The point made by the purchaser is not that there was no revival, but that the action was not properly revived — it is true against Michael's personal representatives. But whether the court should proceed by bringing in these personal representatives or the heirs-at-law, or the successor in interest to the equity of redemption, was a question necessarily determined before granting judgment of foreclosure and sale. By that determination all parties are bound; and practically there can be no prejudice, as Michael had full notice and was made a party as Felix's administrator. I think the purchaser will get a good title, and that we are not asking him to purchase a law suit nor a doubtful title. Upon the whole the motion to compel him to complete must be granted, but, as the question seems to be new, without costs.

SUPREME COURT.

In the Matter of the BROOKLYN RAPID TRANSIT COMPANY.

In the Matter of the EAST RIVER AND CONEY ISLAND RAPID TRANSIT COMPANY.

Elevated railroads — Rapid transit act — Laws of 1875, chapter 606 — Conditions precedent to construction — Compensation to owners of property taken — Rights of abutting owners.

The supreme court has the power and it is their duty to review the report of commissioners appointed by the general term, pursuant to the provisions of the rapid transit act of 1875 (*sec.* 4), upon the facts, and, after a consideration of all the circumstances, to determine the question whether private rights and interests should be yielded for the sake of the public good.

No man's property should be taken for or injuriously affected by the construction or operation of an elevated railroad, except upon the condition that compensation for all damages sustained by him thereby should be made.

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Ample protection against direct invasions of the rights of private property is afforded by the constitution. It cannot be taken for public use without compensation.

But it seems a mooted question whether owners of property which merely abuts upon the street, and not actually taken by the railroad corporation, although injuriously affected, are protected by the constitutional provision referred to.

The right to construct elevated railroads in streets should be made to depend upon their providing a suitable and sufficient indemnity to abutting owners against any damages which they may sustain thereby; or, if they may justly be deemed too onerous, then provision should be made by law for such indemnity in some other mode. Until such indemnity, in a suitable form, shall have been provided, the right to construct should be denied.

Second Department, General Term, February, 1882.

IN the first case the general term appointed three commissioners, under the rapid transit act of 1875 (*sec. 4*). The commissioners reported against the petitioners, and in favor of the property owners on the proposed route in the city of Brooklyn for the construction of an elevated railroad.

The company now move to modify the report, and the property owners on Fulton and other streets move to confirm it.

Bergen & Dykman, for Rapid Transit Company.

T. C. Cronin, for property owners.

In the second case, the three commissioners reported against part of the proposed route for an elevated railroad, and in favor of part of it, through Pearl and other streets in the city of Brooklyn, as asked for by the petitioners. A motion was now made to confirm the same.

J. H. Bergen and *Jesse Johnson*, for Transit Company.

David Barnett and *N. H. Clements*, opposed, for property owners.

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The following opinions were delivered and adopted as the law of each case, and motion to modify in one case and the motion to confirm in the other denied :

BARNARD, *P. J.*—The report should not be confirmed. The proposed elevated road passes through many streets of the city of Brooklyn of various widths. It crosses many others. It must be assumed that in many cases the abutting owner does not own the fee of the street itself. Many owners are bounded by the side of the street to be taken, and others own the fee of the street, subject to the public easement upon it as a street. The streets are in many cases completely built up. The proposed route passes many places of business and many dwellings.

It must also be assumed that in some cases large damage is to be suffered by abutting owners. The act under which the road is to be built makes no provision for compensation for the injury to the buildings and premises fronting on the streets.

The evidence in this case discloses many persons who believe their property will be ruined by the road. The right to their damages is questioned. If they do not own the fee of the street their property rights are said not to be taken or affected. If they do own to the center of the street, can they get more than the difference between a street with and without a railroad upon it? If the fee is owned by another than the abutting owner, his rights are merely nominal, and still that may be all which is to be paid for the disturbance of the owner of the premises bounded upon the street. While these questions are unsettled I am unalterably opposed to the confirmation of this report.

No magnitude of the public benefit to result from the building of this road will compensate for the injustice to be done by a partial destruction in value of the property of a single owner without compensation. What this compensation is to be will be determined after the legislature provides a

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scheme of compensation which shall embrace the injury, by a commission or by a jury. The amount awarded should first be paid to the owner, as is required in the case of railroads constructed under the general law. There should be no taking first and payment afterward, as each owner shall be able to force the assessment against the opposition of the railroad. Without, therefore, examining the question whether the railroad proposed is really rapid transit or is a mere incident to Coney Island travel, the motion for confirmation should be denied.

GILBERT, J.—The constitution of the state requires, as a condition precedent to the construction of a street railroad, that the consent of the owners of one-half in value of the property bounded on that portion of the street upon which it is proposed to construct such railroad shall be first obtained, or in case the consent of such property owners cannot be obtained, then the determination of commissioners appointed by this court that such railroad ought to be constructed, confirmed by the court, may be taken in lieu of the consent of the property owners. The petitioner is a corporation organized pursuant to the act known as the rapid transit act, and that act contained the same requirement (*Const. art. 3, sec. 18; Laws 1875, chap. 606*). This is an application by the corporation to confirm a determination of commissioners that the railroad which it proposes to construct in the city of Brooklyn, and to operate by steam power, ought to be constructed and operated, notwithstanding the requisite consent of the property owners has not been obtained and the corporation has made no provision for compensating such owners as may sustain damages by reason of the construction and operation of such railroad. It has been decided by the court of last resort (82 *N. Y.*, 95) that this court has the power and that it is our duty to review the report of the commissioners upon the facts, and, after a consideration of all the circumstances, to determine the question whether private rights and interests should

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be yielded for the sake of the public good. That being so, I have no hesitation in declaring my opinion that no man's property should be taken for or injuriously affected by the construction or operation of an elevated railroad, except upon the condition that compensation for all damages sustained by him thereby should be made. Ample protection against direct invasions of the rights of private property is afforded by the fundamental law. It cannot be taken for public use without compensation. But property which merely abuts upon the street and which the corporation does not "take" in a technical sense, may be injuriously affected by the railroad. The exclusion of light, the diffusion of oppressive odors, smoke and steam, the disturbance created by the rattling of the cars and the obstruction of the atmosphere, tend to impair the value of property. The fact is indisputable, that in many instances elevated railroads operated by steam power have injured property which has not been taken or in any manner appropriated by the corporation that runs thereon. The evidence before us shows that similar consequence will follow the construction and operation of the petitioners' proposed railroad. The injustice of treating such injuries as undeserving of compensation is perfectly apparent, nor can any amount of public benefit be deemed a just compensation therefor. And yet it is still a mooted question whether owners of property injuriously affected but not actually taken by the railroad corporation are protected by the constitutional provision referred to. That question should be set at rest before railroad corporations are permitted to inflict further injuries upon private property. Their right to construct elevated railroads in streets should be made dependent upon their providing a suitable and sufficient indemnity to abutting owners against any damages which they may sustain thereby; or, if they may justly be deemed too onerous, then provision should be made by law for such indemnity in some other mode. Until such indemnity in a suitable form shall have been provided, the report ought not to be confirmed.

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DYKMAN, J.— It is in the fundamental law of this state that no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained; or, in case the consent of such property owners cannot be first obtained, the general term of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. This constitutional restriction was respected in the rapid transit act of 1875, and the last part of section 3 of that law was made in conformity thereto. This corporation was organized under these restrictions, and is now in full subjection to their entire scope and limitation, and so it has been conducted thus far. The first commission contemplated has been appointed, and by it a route has been fixed and determined for a road. The effort to procure the consent of the requisite number of owners of property bounded on the streets on which it was proposed to construct and operate the road resulted in failure. Thereupon there were appointed by the general term of the supreme court three commissioners to determine whether the road ought to be constructed and operated, and they have made report to the court in favor of construction. Yet to stand in place of consent of the property holders their determination must be confirmed by the court. Such confirmation is now sought by the corporation and resisted by the owners, and the power to be exerted by the court is not a mere formal function. It has jurisdiction, power and duty to review the whole case, examine all the facts and determine, in the exercise of sound judicial discretion, whether they are sufficient to warrant the determination

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of the commissioners (*Matter of Kings County Elevated Railway Company*, 82 N. Y., 95). Plain it is that new functions have been added to the court to determine when, in sound policy, the objections of property owners should be overridden, and that in taking this power from the legislature and grafting it on the judicial system, the intent was to secure more effectually private property against corporate encroachments. The wisdom of this provision in thus placing a power of partial repression in the property owners is well illustrated by this case. The constitution, without discrimination against the lack of technical title to the center of city streets, recognizes the rights of abutting owners, and places in their hands a partial veto power. That power has been exerted, and the reason put forward in justification of the veto is the great and irreparable injury and damage which must result to private property by the construction of this road. This introduces to consideration the question of compensation, and being in, it takes place in the front rank of importance. In the present state of the law compensation is at least uncertain, and it is not just to throw any doubts in the balance against the owners of abutting property. The construction of this railroad would cause a sacrifice of private property, and the most ardent advocate of the rights of eminent domain under which private property is appropriated would never claim that it could or should be used to wrest private property from its owners where there may be no compensation. Public good alone is to be weighed against individual industry. The construction of a railway without compensation is confiscation of property, and to outweigh that there must be some public necessity. That has not been shown in this case. There may be and doubtless is a necessity for some means of rapid transit in Brooklyn, but there is at least equal necessity for protection to private rights and private property, and when the constitution has placed in the hands of property owners a weapon for their defense against corporations, of which they cannot be disarmed even

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by the legislature, the courts will not take it from them and deliver them over to their enemies without the clearest necessity. The great corporations, including the elevated railroads, have already sufficient power and control, without assistance from the courts, to tighten or extend their grasp. They have been favored by the legislature with franchises and privileges until they have colossal proportions and are carried on for the aggrandizement of the favored few in much disregard of individuals and private rights and at the great expense of the many, but we may at least hope that the day is not nigh when they can buy out the law or shove by justice. If the necessity for rapid transit in Brooklyn be as great as this corporation claims, it will remunerate an outlay for depreciations to private property to result from its realization, and its future may with safety be left to the operation of commercial laws. No further elaboration of this subject will be attempted here, and this opinion is against confirmation of this report on the following grounds :

First. That compensation is not assured.

Second. That construction of an elevated railway on city streets without compensation is confiscation.

Third. There is not disclosed a public necessity sufficient to justify the court in permitting the erection of this railroad against the dissent and opposition of more than one-half of the owners of property along its line.

The motion to confirm should be denied.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, appellants, agt.
ADA LINCOLN, respondent.

Criminal law — Term of imprisonment — from what time sentence begins to run.

On convictions for misdemeanor the sentence begins to run from the day it is pronounced, and the time the prisoner is detained in the county jail is to be credited upon the sentence. (*This seems to be adverse to People ex rel. King agt. McEwen, ante, 226.*)

Fourth Department, General Term, October, 1881.

Before SMITH, P. J., HAIGHT and HARDIN, JJ.

E. B. Fenner, district-attorney, for appellants.

A. McDonald, for respondent.

HARDIN, J. — This is an appeal from an order made by the special county judge of Monroe county discharging the respondent from the Monroe county penitentiary, where she was imprisoned upon a commitment issued by the recorder of the city of Elmira.

On the 13th day of April, 1880, the respondent was convicted before said recorder of being a disorderly person, and sentenced to be imprisoned six months in the Monroe county penitentiary. Thereupon she was confined in the county jail until about the 1st of June, 1880, when having sued out a *certiorari* to review the proceedings she was let to bail, and remained out upon bail until the 28th day of August, 1880, when she was surrendered by her bail to the custody of the keeper of the jail of Chemung county, and there detained by him until the 28th day of September, 1880, when she was removed to the custody of the keeper or superintendent of the

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Monroe county penitentiary, and remained until the 28th day of December, 1880, when she was discharged by the special county judge of Monroe county, and from his order the people have taken this appeal (*Code of Civil Procedure, sections 2008, 2009*).

The conviction of the respondent, and sentence for six months, could not be upheld under the Revised Statutes.

They provided that in case it appear that the accused is a disorderly person. The justice may require of the offender sufficient sureties for his or her good behavior for the space of one year. In default of such sureties being found the justice shall make up, sign and file in the county clerk's office a record of the *conviction* of such offender as a disorderly person, * * * and shall, by warrant under his hand, commit such offender to the common jail of the city or county, there to remain until such sureties be found or such offender be discharged according to law (2 *R. S.*, 893, *sec. 1, chap. 20, part 1*). Under the Revised Statutes the sentence imposed was not authorized.

But the charter of Elmira, passed in 1875 (*chap. 370*) contains a section conferring upon the recorder jurisdiction, exclusive of justices of the peace, over offenders of the class to which the respondent belongs.

Section 104 of the act of 1875 declares that when any such person shall "be brought before the recorder, he shall, upon conviction of such person, *have* power to punish by fine, not exceeding fifty dollars, or by imprisonment in the common jail of Chemung county for a term not exceeding six months, or by both such fine and imprisonment."

So far as the later statute is repugnant to the Revised Statutes in the territory to which it is applicable, it controls and, by implication, repeals the Revised Statutes *pro tanto* (3 *N. Y.*, 290; 32 *N. Y.*, 591; 69 *N. Y.*, 605).

The conviction was regular and the sentence properly imposed by the recorder, under the provision of the charter of the city of Elmira. However, under that provision the

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recorder was authorized to sentence the offender to imprisonment "in the common jail of Chemung county."

By the agreement between the counties of Monroe and Chemung, entered into December twenty-eighth, it was provided that the Monroe county penitentiary should receive and keep persons convicted in Chemung, &c. Chapter 209, section 2 of the Laws of 1874, made it the duty of the recorder, after such contract was made, to sentence such offenders to imprisonment in the penitentiary of Monroe county.

The recorder therefore acted under the requirements of the statute of 1874 when he fixed the sentence of the respondent.

That law was held to be valid in *Brown agt. People* (75 N. Y., 437). We therefore must hold that the commitment to the penitentiary was valid. Under and after the sentence of six months' imprisonment the respondent was actually *detained* in custody in the county jail, and in the penitentiary the full period of six months, before the special county judge discharged her.

We think she was enduring the sentence when in custody after the sentence was pronounced.

The case of the *People ex rel. Stokes* (66 N. Y., 342) is distinguishable from the one before us, as there the imprisonment which the court refused to credit upon his sentence was such as he suffered before trial and conviction and sentence.

In the case in hand we are of the opinion that the sentence began to run from the day it was pronounced, and that all the time the respondent was in custody after that day is to be credited upon her sentence. Being thus credited, it appeared to the special county judge that she had been imprisoned six months.

The conviction was not for a felony, and the imprisonment in the county jail was as much of a punishment in theory of law as in the Monroe county penitentiary. This case is therefore not within the reasoning of attorney-general Schoonmaker, stated in his letter of March 14, 1879, to the clerk of

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Auburn prison. He was considering cases of felony punishable by imprisonment in a state's prison by becoming "an inmate of a state's prison.

The special county judge having come to the conclusion that "the time for which the prisoner may be legally detained" had expired, properly granted to her a discharge (*sec. 2032, 2034, of the Code of Civil Procedure*). His order should be affirmed.

Order affirmed.

SMITH, P. J., and HAIGHT, J., concurred.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. LOREN B.
SESSIONS.

Criminal law — Indictment — When, how and under what circumstances an indictment may be removed from the court of sessions to the court of oyer and terminer — What is good cause — Code of Criminal Procedure, sections 344, 346, 347, 962, 963.

Every application for the removal of an indictment must rest in the sound discretion of the court or judge who is to determine it.

A motion of this character should be granted not only when the obtaining of an impartial and fair trial requires it, but also whenever the situation and official standing of the accused party, the undisputed and clearly divided line of popular opinion, and the circumstances of the alleged crime, as well as the important legal questions which it presents, so magnify the importance of the cause as to justify its removal from the inferior to the superior tribunal for trial.

S., a member of the senate of this state, was indicted in the court of sessions of Albany county for the crime of bribery, the act alleged being the payment by him of \$2,000 to B., then a member of assembly, to induce the said B. to vote for D. to represent the state in the senate of the United States. On a motion by defendant to remove the indictment from the court of sessions to the court of oyer and terminer:

Held, that as this case would involve difficult legal questions (*see chap. 599, Laws of 1853; chap. 742, Laws of 1869; article 15 of the Constitution*); that the political and official standing of the accused, the act charged and

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the warm and bitter feelings which the allegation of its perpetration caused have magnified this cause far above and beyond an offense committed under other and different circumstances, renders it a case of sufficient importance as to justify its removal.

Although the notice was one to be made at special term, and not to a judge of the court; *held*, that as a special term must be held by a single judge, and as the judge who in fact held it, when the motion was made, is the identical one specified in the notice of motion before whom, at special term, it would be made, the objection must be disregarded. As the notice is of a motion "before Mr. justice WESTBROOK," the addition thereto "at the next special term," &c., may be rejected as surplusage.

Ulster Special Term, January, 1882.

MOTION on behalf of the defendant to remove an indictment from the court of sessions of Albany county to the court of oyer and terminer of the same county.

R. W. Peckham and Hamilton Harris, for motion.

Attorney-General Russell and District-Attorney Herrick, opposed.

WESTBROOK, J. — Since the argument of this motion, on Saturday afternoon last, I have been constantly occupied with the Ulster circuit, the session of which has closed this (January 20, 1882) morning. The public interest manifested in this case, the gravity of the charge, and the social and political standing of the parties implicated, as well as the unsettled condition of the law in regard to a motion of this character, unite in requiring a statement of the reasons for judicial action, which could not, owing to my engagements in court, as above stated, be sooner prepared.

At the Albany sessions in June, 1881, the defendant, Loren B. Sessions, was indicted for the crime of bribery, the act alleged being the payment by him of \$2,000 to Samuel H. Bradley then a member of assembly of the state of New York, to induce the said Bradley to vote for Chauncey M. Depew to represent the state in the senate of the United States.

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The history of the case since the presentation of the indictment is as follows: During the term of the court at which such indictment was found, the defendant appeared, and by his then counsel, Messrs. Rufus W. Peckham and Henry Smith, demanded an immediate trial. Owing to the wide-spread publicity of the facts of the case which had been very fully stated and discussed by the press of the entire country, and the excitement of that period, the district attorney declined to then bring the cause to trial. It therefore was continued to the September sessions of the same year. One of the counsel for the defendant, Mr. Henry Smith, had in the meantime become very ill, which illness still continues, and the indictment was not then pressed. At the November sessions, and at the October and December oyers, no action seems to have been taken by either side to have the matter disposed of, but at the present term of the court of sessions (January, 1882), the district attorney pressed the trial, and the defendant, having procured from Mr. Justice Ingalls a stay of proceedings, moves to transfer the case from the sessions to the oyer, the first term of which is to be held on the first Monday in February next.

The grounds of the motion are: That the case is one of unusual public interest and importance, made so by the official and political standing of the parties involved in the charge, and that grave and difficult legal questions must arise upon the trial thereof. The statement just made necessitates an examination of the statutes regulating this and similar applications.

By the Code of Criminal Procedure (*sec.* 344) "a criminal action, prosecuted by indictment, may, at any time before trial, on the application of the defendant, be removed * * * from a court of sessions or a city court to the court of oyer and terminer of the same county, for good cause shown." Notice of the application for such removal, which "must be made to the supreme court, at a special term in the district" (*sec.* 346), is required to be given to the district attorney of the county where the indictment is pending, and to enable

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the defendant to make the motion, a judge of the supreme court is authorized (*sec. 347*) to "make an order staying the trial of the indictment until the application can be made and decided." The Code of Criminal Procedure, however, took effect (*sec. 963*) "on the 1st day of September, 1881," and as the practice under it (*sec. 962*) only applies to "criminal actions and to all other proceedings in criminal cases * * * from the time when it takes effect," leaving all others to "be conducted in the same manner as if this Code had not been passed," it follows, the indictment having been found in June, 1881, that the present application, which is based upon the Code, must fail, unless the papers presented can be used under the provisions of the Revised Statutes, the enactments of which will be next considered.

By the Revised Statutes (*vol. 3 [6th ed.], p. 1026, sec. 89, &c.*), "every person against whom an indictment shall be pending in any court of sessions, may apply to any justice of the supreme court for an order to remove such indictment to the court of oyer and terminer of the county in which the same was found." The application must "set forth a copy of the indictment, or the substance thereof, the time when it was found, the proceedings thereon, if any, and the facts and circumstances rendering a removal thereof expedient, and shall be verified by affidavit." It is then declared that (*sec. 89*) "the officer to whom such application is made shall grant an order that such indictment be removed to, and that the defendant therein be tried at the next court of oyer and terminer to be held in the county where such indictment was found, unless it shall appear that the application therefor was not made in due season, or that such removal will produce any injurious delay, or in any way tend to prevent a due prosecution of such indictment."

By a comparison of the provisions of the Revised Statutes, which have just been given, with those of the Code, it will be observed that there is an important difference between them in one particular. The latter requires for the removal, "good

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cause shown," whilst the former makes the removal a matter of right, unless the application should be refused for the reasons which they specifically state. Chapter 325 of the Laws of 1878, however, amended section 76 of the Revised Statutes (*the section numbered 87 in the 6th ed.*), so as to require a notice of ten days to the district attorney of the county in which the indictment is pending, and a service upon him of copies of all the papers on which such application is made. The same act also amends the seventy-eighth section of the Revised Statutes (*sec. 89 of 6th ed.*) by substituting the word "may" for "shall" thus submitting the application to the discretion of the judge, instead of making the granting thereof a matter of right, unless forbidden for one of the reasons which the section particularizes. As a power vested in a court or a judicial officer should always be exercised in a proper case, and in no other, it follows that there is now no substantial difference between the Revised Statutes and the Code as to the causes justifying the removal of a criminal action from the sessions to the oyer. By the former "the facts and circumstances rendering a removal thereof expedient" must be stated in the moving papers, and as upon their sufficiency a judicial discretion is to be exercised, it is entirely clear that such "facts and circumstances," which are to be stated in an application under the Revised Statutes, must be such as amount to what the Code calls "good cause." In disposing of the present application, then, we are required to decide, what is "good cause" for the removal of an indictment from the sessions to the oyer for trial.

It was stated by counsel on both sides, upon the argument of this motion, that the point now to be considered has never been decided in this state. The reason for the absence of judicial precedent to guide us, is doubtless to be found in the fact already stated, that prior to the year 1878, when the Revised Statutes were amended in this particular, an application of this character was to be granted unless it could be refused for the reasons which the statutes themselves specify.

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We are compelled then to define "good cause" for ourselves, unaided by the reasoning of others. In attempting to solve this legal problem, the first thought which naturally suggests itself is: Why was an expression so general and sweeping used? If the legislature had in view any particular reasons, which, in their judgment, were sufficient to transfer any criminal action from the one court to the other, and had determined that no others should have that effect, those reasons would have been embodied in the statute. The result from such omission, and the general language employed is, that every application for removal must rest in the sound discretion of the court or judge who is to determine it, and the reasons must be as various as the surroundings of each case in which it is attempted. Without undertaking to define with exact precision the phrase employed, it will be safe to say, that a motion of this character should be granted not only when the obtainment of an impartial and fair trial requires it, but also whenever the situation and official standing of the accused party, the widespread and clearly divided line of popular opinion, and the circumstances of the alleged crime, as well as the important legal questions which it presents, so magnify the importance of the cause, as to justify its removal from the inferior to the superior tribunal for trial. In deciding upon such an application, it is impossible that the court or judge to whom it is addressed, should regard the *personnel* of the magistrate who is to preside in the lower court. An attempt by any court or judge to weigh in his own judgment the mental and moral qualifications of judges, who fill positions of equal grade, and then to grant or refuse an application of this character according to his judgment of the qualifications of the particular judge who presides over the tribunal from which the proceeding is sought to be removed, would be exceptional conduct in the administration of justice. Rules for the government of judicial tribunals must be general in their character, and not fluctuating according to the caprice of the individual who presides over their

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deliberations. While, as a fact, the writer of this opinion freely concedes the learning, integrity and ability of the present county judge of Albany county, who presides over its court of sessions, yet that fact cannot overcome the legal and only practical rule, that the dignity and importance of a court must depend upon its constitutional *status*. In other words, the tribunal or court which the laws of the state make the superior one must, in the administration of justice, be so regarded. This brings us to the question: Is the present application within the rule indicated?

That this case will involve difficult legal questions (*see chap. 539, Laws of 1853; chap. 742 of Laws of 1869; art. 15 of the Constitution*) it is easy to see. That the political and official standing of the accused (he was, at the time of the alleged act, a member of the senate of this state), the act charged, and the warm and bitter feelings which the allegation of its perpetration caused, have magnified this cause far above and beyond an offense committed under other and different circumstances must also be conceded; and if any case of sufficient importance can be supposed, in which the relief asked should be granted, then the present is that case.

It is said, however, that this motion should be refused because the notice was one to be made at special term, and not to a judge of the court, as the Revised Statutes provide. There is, as in the preparation of the moving papers the attorney who drafted them relied upon the Code, and not the Revised Statutes, this technical difficulty. As, however, a special term must be held by a single judge, and as the judge who in fact held it, when the motion was made, is the identical one specified in the notice of motion before whom at special term it would be made, the objection must be disregarded. A refusal on any such ground as this would only tend to delay. The papers served contain all that the Revised Statutes require, and as the notice is of a motion "before Mr. justice WESTBROOK," the addition thereto "at the next special term," etc., may be rejected as surplusage.

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In granting this motion the objection founded upon the terms of courts already passed has not been forgotten. The papers show that (with the exception of the June term when the defendant urged a trial) until the present term of the Albany sessions neither party has pressed the cause to a conclusion. Owing to the illness of Mr. Henry Smith, one of the counsel for the defendant, there was no consultation between Mr. Peckham and his present associate until the present court began, and of course there was no conclusion as to the propriety of this action. The oyer and terminer will be held on the first Monday in February next, and the delay is therefore not at all serious, and can work no prejudice. Neither will the granting of the motion, which the statute seems to me to demand, deprive the people of the services of the judge who presides over the court of sessions. He is a member of the oyer and terminer to which the action is transferred, and can and ought to sit during the trial. The association with him of a justice of the supreme court of the state to assist in the administration of justice can work no wrong, but will be an additional guarantee of safety in the conduct of a trial of great importance both to the people and the accused."

SUPREME COURT.

THE PEOPLE'S BANK OF THE CITY OF NEW YORK agt. THE
MECHANICS' NATIONAL BANK OF NEWARK.

National banks — jurisdiction of state court in actions against — Attachments against national banks of a foreign state — who may move to vacate — Code of Civil Procedure, section 682.

A receiver of a foreign national bank, though not a party to the action, has such a *status*, under section 682 of the Code of Civil Procedure, as will authorize him to move to set aside attachment proceedings.

There is nothing in the section which requires the applicant to become a party to the action. It is the practice to allow such motions to be made

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without imposing upon the applicant the condition that he shall ask to be made a party to the action in which the attachment was issued.

Although the supreme court of this state has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another state, an attachment which has been issued in such action against its property in this state will be vacated upon positive proofs of its insolvency.

Special Term, January, 1882.

Gray & Davenport, for plaintiff.

Martin & Smith, for defendants.

LAWRENCE, J. — It was held by the court of appeals, in the case of *Robinson agt. The National Bank of Newberne* (81 N. Y., 385; S. C., 59 How., 218), that the supreme court of this state has jurisdiction of an action *ex contractu*, brought by a citizen of this state against a national bank located in another state, and that the provisions of the national banking act (*U. S. R. S., sec. 5242*), prohibiting the issuing of an attachment, injunction or execution against such an association, or its property before final judgment, applies only to an association which has become insolvent, or to one about to become so, as specified in the preceding part of the section. In that case the cases of the *Central National Bank agt. The Richland National Bank* (52 How. Pr., 136 and 137) and of *Rhoner agt. The First National Bank* (14 Hun, 126) were cited upon the brief of the appellant's counsel, and must have been considered by the court, and in so far as those cases lay down a doctrine which differs from that enunciated in *Robinson agt. The National Bank of Newbern* they must yield to the latter case. In this case it is sought to sustain the jurisdiction of the court and to bring the case within the doctrine of *Robinson agt. The National Bank of Newberne* (*supra*), by denying the insolvency of the defendant, and it is claimed that the question should be disposed of by a reference. I regard it as a sufficient answer to this point to

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say that the affidavits submitted on the part of plaintiffs do not meet or overcome, in my judgment, the very positive proofs of the insolvency of the defendant, which are presented on behalf of the receiver, and therefore a reference is unnecessary. It is further urged that as the receiver appears only specially for the purposes of this motion, and has not submitted himself generally to the jurisdiction of the court, his application ought not to be entertained. But this position cannot be maintained. Under the old Code it was held that a subsequent attaching creditor could not move to set aside a prior attachment (*See sec. 241 of the Code of Procedure; Ketchum agt. Ketchum*, 1 *Abbott* [*N. S.*], 157). But under section 682 of the Code of Civil Procedure, "the defendant or a person who has acquired a lien upon or interest in his property after it was attached, may, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief together or in the alternative." The receiver of the defendant in this case certainly brings himself within the language of this section. He has acquired "a lien upon or interest in the defendant's property" since the attachment was issued. There is nothing in the section which requires the applicant to become a party to the action. And it is everyday practice to allow such motions to be made without imposing upon the applicant the condition that he shall ask to be made a party to the action in which the attachment was granted. Furthermore, it is quite apparent that this section was intended to put subsequent creditors or parties subsequently acquiring a lien upon or interest in the defendant's property upon the same footing as that occupied by the defendant under the old Code (*See Mr. Throop's note to sec. 682 of the Code of Civil Procedure*). And under the old Code, it was held that the defendant was entitled to make a motion to set aside the attachment without putting in a general appearance in the

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action (*Manice* agt. *Gould*, 1 *Abbott's Pr.* [N. S.], 255). The cases of *Tracy* agt. *The First National Bank of Selma* (37 N. Y., 524) and *Allen* agt. *The Scandinavian National Bank* (46 *How. Pr.*, 71) were decided prior to the passage of the Code of Civil Procedure, and therefore have no bearing on this case. I am therefore of the opinion that the motion to vacate the attachment should be granted, but under the circumstances, without costs.

NOTE. — In *Chapman* agt. *Same*; *The National Shoe and Leather Bank* agt. *Same*; *Hillman* agt. *Same*; *Clark* agt. *Same*; *West Side Bank* agt. *Same*; *Corn Exchange Bank* agt. *Same*, the motion to vacate attachment was granted, without costs, for the reasons stated in the above opinion. [Ed.]

N. Y. SUPERIOR COURT.

THOMAS VERNON and others agt. ALBERT PALMER.

Corporations — Manufacturing, &c. — Liability of a trustee under chapter 40, Laws of 1848 — what three things must concur to charge a trustee.

The statute as to the liability of a trustee of a corporation for the debts of the same on their failure to make and file its annual report (*Laws of 1848, chap. 40*) is a penal one, and must be strictly construed.

To charge a trustee with liability under this statute three things are necessary: A debt which is due and payable from the corporation, a default in the filing of the annual report, and a trusteeship on the part of the party to be charged.

Defendant was elected a trustee of a manufacturing corporation for the year ending August 6, 1878, accepted the office, and there never was a subsequent election of trustees. In January, 1878, it failed to file its annual report, and a receiver of the corporation was appointed November 9, 1878. The corporation gave to the plaintiffs its promissory note for \$979.07, due August 10, 1878, and the plaintiffs sold and delivered to the company certain goods in June, July and August, 1878, on an agreed credit of four months after delivery, which thus became due in October, November and December, 1878. In an action under the manufacturing act (*sec. 12, chap. 40, Laws of 1848*) to recover for the same, because of the failure to file its annual report.

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Held, that the complaint should be dismissed. Although the goods were sold at a time when the defendant was a trustee, they were sold on a credit which did not expire until after the defendant ceased to be a trustee.

A debt within this statute is not contracted until there is an obligation giving a present right of action against the corporation. If there be no such obligation nor debt or duty which may be presently demanded from the corporation, there is no debt or duty which can be demanded under the statute as a penalty against the trustee.

Trial Term, January 13, 1882.

THE action was begun on November 18, 1878, by Thomas Vernon, David Scott and George R. Vernon, copartners, forming the firm of Vernon Brothers & Co., against the defendant as a trustee of a manufacturing corporation, under the law of 1848, of which corporation the plaintiffs were creditors.

It was admitted that the McKillop & Sprague Company was a domestic corporation under the act of 1848 (*chap.* 40), and that in January, 1878, it failed to file its annual report, and that a receiver of the corporation was appointed November 9, 1878; that the defendant was elected a trustee for the year ending the first Tuesday of August, 1878, accepted the office, and there never was a subsequent election of trustees; that the McKillop & Sprague Company gave to the plaintiffs its promissory note for \$979.07 due August 10, 1878; that the plaintiffs sold and delivered to the company certain goods in June, July and August, 1878, on an agreed credit of four months after delivery, which thus became due in October, November and December, 1878.

The defendants conceded the above for the purposes of the case, and that the amounts on the note and the goods with interest amounted to \$1,687.62, which was due and owing.

Paddock & Carmon, for plaintiffs.

James B. Dill, for defendant.

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At the close of the plaintiffs case, the defendant moved to dismiss the case on the merits, on the grounds that the facts as stated were not sufficient to constitute a cause of action, inasmuch as the debt, the trusteeship and the default did not coincide in point of time. The defense urged: *First*. That to charge a trustee with liability under the act of 1848, three things are necessary: A debt which is due and payable from the corporation, a default in filing the annual report, and a trusteeship on the part of the defendant (*Chambers agt. Lewis*, 55 *N. Y.*, 400; *The Shaler & Hall Quarry Co. agt. Bliss*, 27 *N. Y.*, 297).

Second. The defendant was not a trustee on or after August 6, 1878 (*Van Amberg agt. Baker*, 81 *N. Y.*, 27; *Phila. and Reading Coal and Iron Co. agt. Hotchkiss*, *Albany Law Jour.* [vol. 22], 515).

Third. There was no debt against the trustee within the meaning of the statute, until on and subsequent to August 6, 1878, because no day of payment had arrived (*Jones agt. Barlow*, 62 *N. Y.*, 202; *Whitney Arms Co. agt. Barlow*, 63 *N. Y.*, 73; *National Bank agt. Fenton*, 23 *Hun*, 309).

TRUAX, J. — For the purposes of this motion it is conceded that the defendant's term of office expired on the 6th day of August, 1878. The goods were sold before that time on a credit that did not expire until some time after the fifth of August.

The statute, to which I have been referred, says that the trustees of a corporation which fails to make and file its annual report, shall be jointly and severally liable for all the debts of the company existing at the time of the failure to make and file such report, and for all the debts that shall be contracted before the report shall be made.

The reason of the statute is, to require corporations to make such public showing of their affairs that those dealing with them may be able to determine whether they can safely give them credit.

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If the question before me was an original one, I should hold that the defendant was liable because the credit was *given*, the debt was contracted before the report was made, and at a time when the defendant was trustee. But the question is not an original one. A long line of decisions in this state and elsewhere hold that the statute is a penal one and is to be strictly construed. In this case, while the goods were sold at a time when the defendant was a trustee, they were sold on a credit which did not expire until after the defendant ceased to be a trustee. In order to charge a trustee under this statute, three things must concur in point of time, the trusteeship, the default to publish the report, and the contracting of the debt. But the courts of this state hold that a debt within this statute is not contracted until there is an obligation giving a present right of action against the corporation. If, said judge ALLEN, there be no such obligation, nor debt or duty, which may be presently demanded from the corporation, there is no debt or duty which can be demanded under the statute as a penalty against the trustee.

There is no debt within the meaning of the statute. If the day of payment has not arrived, the penalty is incurred by the default, but the liability to any individual creditor, does not become absolute until it shall exist within the meaning of the statute; and a default in payment was here made by the corporation, but there can be no default in payment until the day of payment shall have arrived, and, on this case, when that day of payment arrived the defendant was not a trustee, and one member of the trinity above mentioned was wanting, the complaint is dismissed.

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SUPREME COURT.

ANDREW J. BATES *et al.* agt. SAMUEL PLONSKY *et al.*

Action — Right of attaching creditors to remove fraudulent obstructions to the due execution of process — Complaint — When not multifarious — Injunction — Code of Civil Procedure, sections 603, 604, 619.

Where the allegations of the complaint showed that plaintiffs have a lien by attachment on a certain stock of goods of defendant, Samuel Plonsky, which lien was acquired December 24, 1881, and still is in force. That on December 13, 1881, Samuel Plonsky made a general assignment to Eli M. Cohen, who claims the said attached property and has notified the sheriff of such claim; that in said assignment the defendants Anna, Ezekiel and Moses Plonsky are preferred creditors; that the assignment is fraudulent and void, and part of a fraudulent conspiracy between the defendants, and that the preferred claims are wholly or in part fictitious; that on December 23, 1881, notwithstanding those preferences, the defendant, Samuel Plonsky, confessed judgments to each of the defendants Anna, Ezekiel and Moses Plonsky upon the same debts for which they are preferred in the assignment. Executions were on that day issued to the sheriff, who took possession of the same property attached by the sheriff upon the warrants of plaintiffs. That these executions are prior liens to those of the plaintiff, and sheriff recognizes them as such. It is charged, and the proofs show, that these judgments and executions form and are a part of the conspiracy to defraud the creditors of Samuel Plonsky. The prayer of the complaint is substantially that the obstructions created by the fraudulent execution and assignment be removed. The action is brought by plaintiffs against Samuel Plonsky, Eli M. Cohen, Anna Plonsky, Ezekiel Plonsky and Moses Plonsky, and a motion is made for an injunction to restrain the defendants from receiving and the sheriff from paying these amounts of the executions:

Held, first, that the right of action can be sustained upon the principle that the attaching creditors have a specific lien which entitles them to remove fraudulent obstructions to the due execution of the process.

Second. That the complaint is not multifarious for the reason that a conspiracy between all the defendants is charged, and the various devices which have been resorted to are but the details of a single scheme and a common purpose.

Third. That a *prima facie* case for an injunction both upon the law and the facts has been made out.

At Chambers, January, 1882.

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THE motion is to restrain the defendants from receiving and the sheriff from paying the amounts of certain executions in the hands of the latter, issued upon judgments confessed in favor of the former by the defendant, Samuel Plonsky. The allegations of the complaint show: That plaintiffs have a lien by attachment on a certain stock of boots and shoes of the defendant, Samuel Plonsky. This lien was acquired December 24, 1881, and still is in force. That on the 13th of December, 1881, Samuel Plonsky made a general assignment to Eli M. Cohen, and that he claims the said attached property and has notified the sheriff of such claim. That in said assignment the defendants, Anna, Ezekiel and Moses Plonsky, are preferred creditors in amounts aggregating \$5,200. That the assignment is fraudulent and void, and is a part of a fraudulent conspiracy and combination between the defendants, and that the preferred claims are wholly or in part fictitious. That on the 23d day of December, 1881, notwithstanding the preferences, the defendant, Samuel Plonsky, confessed judgments to each of the defendants, Anna, Ezekiel and Moses Plonsky, upon the same debts for which they are preferred in the assignment, upon which judgments executions were on that issued to the sheriff of this county, who took possession of the same property attached by the sheriff upon the warrants of plaintiffs. That these executions are prior liens to those of the plaintiff, and sheriff recognizes them as such. That these judgments are confessed upon fraudulent claims and because it was feared by them that the assignment would be set aside as fraudulent, because of the fictitious character of the preferences, and that the plaintiffs intended to and would indemnify against the claim of the assignee, was it that these judgments were confessed and the execution issued? That these defendants as such judgment creditors have indemnified the sheriff against the claim of the assignee, thus substantially confessing the invalidity of the assignment and that the assignee's claim is fraudulent, and that it is fraudulent

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because the preferences are fictitious. If that be so, and there can be no other construction to this inconsistent conduct, then the judgments and executions must likewise be fraudulent, they being based on the same claims that are preferred in the assignment. It is further shown that Ezekiel Plonsky, one of the indemnifying judgment creditors, is one of the sureties of the assignee upon two separate bonds or undertakings. That the assignee was, up to recently, a clerk of Otto Horwitz, his attorney, and now occupies the same office with the attorney for these judgment creditors. It is charged that these judgments and executions form and are a part of the conspiracy to defraud the creditors of Samuel Plonsky. Anna Plonsky, the wife of defendant, and Moses Plonsky are wholly insolvent. Ezekiel Plonsky has incumbered his property so that unless enjoined from receiving this money the remedy of plaintiffs will be fruitless. The prayer is substantially that the obstructions created by the fraudulent execution and assignment be removed. Affidavits are annexed showing first, by Jerome M. Bates, that Plonsky first offered twenty-five then fifty cents in settlement. Thus showing that by his first offer, at least, he did not intend to act fair with his creditors, and that only after the offers were refused was it that these concessions were given. Mr. Isaac Weil shows that defendant in July stated he opened the Sixth avenue store with \$4,000 to \$5,000, his own money, which bears upon the validity of the preferred claims which are pretended to be for money borrowed for the Sixth avenue store. Mr. John E. Jacobs shows that the preference to the wife is founded upon a fictitious claim as well as that of Moses Plonsky. That the claim of Ezekiel Plonsky does not appear in the schedules; that the said Ezekiel told him, Jacobs, that all that Samuel owed him was \$1,500. It is also charged that the attorney and the assignee, after such judgments were confessed, openly boasted of the apparent success of their scheme to defraud.

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Blumenstiel & Hirsch, for plaintiffs and for motion, made and argued the following points :

I. AS TO THE RIGHT OF ACTION — Plaintiffs having a specific lien upon chattels, have a right to maintain an action to remove any obstruction in their way created by fraud, and this though they be not judgment creditors. This principle is sustained by authority (*Rinchey* agt. *Stryker*, 28 *N. Y.*, 45; *Falconer* agt. *Freeman*, 4 *Sandf. Ch.*, 565; *Thayer* agt. *Willett*, 5 *Bosw.*, 344; *Kelly* agt. *Lane*, 42 *Barb.*, 608; *Thurber* agt. *Blanch*, 50 *N. Y.*, 80). The case of *Frost* agt. *Mott* (34 *N. Y.*, 253), seems to be almost directly in point with the case at bar. It is there held that : “A party attaching property in possession of his debtor, acquires a specific lien on his interest thereon, and is entitled, like a judgment creditor, to impeach the title of a fraudulent mortgagee (*Greenleaf* agt. *Mumford*, 19 *Abb.*, 469; *Kelly* agt. *Lane*, 42 *Barb.*, 594, 608, 609).

II. The foregoing case all hold on principle as well as in point that the creditor obtains a specific lien through the attachment by the fact of the levy thereunder and the taking of the property into his actual possession (48 *Barb.*, 605). That the levy of an attachment creates a specific lien sufficient to authorize an affirmative action of this character, appears not only by the authorities already cited, but by the following cases (*Falconer* agt. *Freeman*, 4 *Sandf. Ch.*, 565; *Greenleaf* agt. *Mumford*, 30 *How.*, 30; *S. C.*, 19 *Abb.*, 469). The sheriff having prior to the issue of the attachments had the property in his possession, no new formal levy or notice was necessary (*Wehle* agt. *Conner*, 83 *N. Y.*, 231).

III. It is claimed that the bill is demurrable for multifariousness of parties — that is, that causes of action have been improperly united. A complete answer to this is, that the bill charges a joint conspiracy to defraud by all the parties, and that such conspiracy is attempted to be enforced by and through the various instruments asked to be set aside, and hence really sets up but one cause of action. Again this is

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an action in equity to remove fraudulent obstructions to our complete possession, and the object of the bill is, in reality, single, to wit, to recover unobstructed possession of the same property (*Boyd* agt. *Hoyt*, 5 *Paige Ch.*, 66; *Fellows* agt. *Fellows*, 4 *Cow.*, 682; *Brinkerhoof* agt. *Broe*, 6 *Johns. Ch.*, 139; *Hammond* agt. *Hudson River Iron Co.*, 20 *Barb.*, 379; *Reed* agt. *Stryker*, 12 *Abb.*, 47; *Morton* agt. *Weil*, 11 *Abb.*, 421; *Newbold* agt. *Warren*, 14 *Abb.*, 80; *Jacob* agt. *Boyle*, 16 *How.*, 106; *Getty* agt. *Devlin*, 70 *N. Y.*, 504; *Beards* agt. *Wheeler*, 76 *N. Y.*, 214).

IV. An action may be brought to set aside fraudulent judgments, though there is a remedy by motion (*Beards* agt. *Wheeler*, 76 *N. Y.*, 214; *Miller* agt. *Earle*, 24 *N. Y.*, 112). The latter cases recognizes the right in favor of one who obtains a legal or equitable lien (*Dunham* agt. *Waterman*, 17 *N. Y.*, 9, 15). The judgments are assailed for fraud. Fraud vitiates a judgment, as well as even the most solemn transaction, and any one affected by a fraudulent judgment may invoke the aid of the court of equity for relief (*Whittley* agt. *Delaney*, 73 *N. Y.*, 574; *Dobson* agt. *Pearce*, 12 *N. Y.*, 165).

V. It is clear that the plaintiffs right of action is complete, the next question is, ought an injunction be granted? We allege fraud and conspiracy as the foundation of this action, and besides establish the insolvency of the parties. A strong *prima facie* case is made out, and as all that is sought to be restrained is the payment of money, no greater damage than the loss of interest can ensue, and even that can be lessened by a deposit in an interest paying institution. Section 604 of the Code of Civil Procedure provides for the injunction now asked for, and it is possible that section 603 is also applicable. Section 619 also provides that where it is claimed that the judgment, verdict, &c., was obtained by actual fraud, the security provided for in cases of staying judgments in previous sections may be dispensed with.

VI. Upon the face of the transaction the entry and confession of these judgments was a fraud. These parties were

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all preferred by the assignment. They were substantially secured. Why, then, the need of these confessions, and why indemnify the sheriff against the title of the assignee under the very assignment in which they are preferred? If the assignment be a valid instrument, then they were perfectly secured and the confessions were made for a fraudulent purpose, to cheat the other creditors and bring this case almost on all fours with that of *Burns* agt. *Morse* (6 *Paige*, 108). On the other hand, if the assignment be void for fraud, it must be because the claims preferred are fictitious (as no other ground therefor is alleged), and by indemnifying the sheriff, as these defendants have done, they substantially say that the property assigned does not belong to the assignee because of the fraudulent character of the assignment. That the debts preferred are fraudulent. If so, the defendants' judgments are equally fraudulent. And the relationship of the judgment debtor with these parties, as well as those of the assignee, and the attorneys for the plaintiffs in those suits, and the attorney for the assignee, almost conclusively establish a fraudulent and unlawful conspiracy.

VII. As to the confessions of judgments. We claim that these are defective on their face, and do not comply with the law. Section 1274, subdivision 2 of the Code of Civil Procedure requires the confession to state concisely the facts out of which the debt arose; and must show that the sum confessed therefor is justly due or to become due. 1st. The statement alleges that the sum was to be repaid on demand. There is no allegation of any demand having been made. As the money is only to be repaid on demand, such demand may never be made. Besides, the statement is too general—it does not show the particular dates nor the amounts of the loans (*Davis* agt. *Morris*, 21 *Barb.*, 152; *Daly* agt. *Matthews*, 12 *Abb.*, 403, *note*; *Dunham* agt. *Waterman*, 17 *N. Y.*, 9, 12 to 14; *Winnebrenner* agt. *Edgerton*, 30 *Barb.*, 185). In the other two judgments a demand is alleged, but the statement otherwise is similarly defective, as being too

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general, as against the plaintiff; these are not mere irregularities, but render the judgment void absolutely (*Daly* agt. *Matthews*, 12 *Abb.*, 406, and the following cases there cited; *Dunham* agt. *Waterman*, 17 *N. Y.*, 9, 14; 12 *N. Y.*, 215; *Winnebrenner* agt. *Edgerton*, 30 *Barb.*, 117, 185, 325; 13 *How.*, 142, 472). No amendment can be allowed so as to give it priority over liens subsequently secured. Whether the judgments be on their face valid or not, it is sufficient that they are *prima facie* fraudulent, and the motion should be granted, with costs.

BARRETT, *J.* — After going over the plaintiff's excellent brief, in connection with all the papers submitted upon this motion, I am satisfied that a *prima facie* case for an injunction, both upon the law and the facts, has been made out. The complaint is not multifarious, for the reason that a conspiracy between all the defendants is charged, and the various devices which have been resorted to are but the details of a single scheme and a common purpose. As to the right of action, I am inclined to think that it can be sustained upon the principle that the attaching creditors have a specific lien which entitles them to remove fraudulent obstructions to the due execution of the process. At all events there is enough in the question for the full consideration of the trial court. Upon the whole the motion must be granted, with ten dollars costs to abide the event.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, respondent, agt.
JOHN O'CONNELL, appellant.

Criminal law — Insanity — Defense of — an affirmative defense — Drunkenness does not constitute insanity — Delirium tremens — When the charge as made is correct, counsel no right to make further requests.

The defense of insanity is an affirmative defense, and the prisoner is bound to satisfy the jury, by proof, that he was insane.

The mere fact that a person is insane does not *per se* relieve him from responsibility. The test is, whether he is capable of distinguishing between right and wrong at the time of and with respect to the act complained of.

Drunkenness in itself, simple drunkenness, whether it is of limited measure or whether it is excessive, does not constitute insanity, and does not excuse a person committing an act from the responsibilities of that act.

But if a person committing an act or doing an injury is in a state of "*delirium tremens*" at the time, and is therefore rendered unable to determine the nature or the quality of the act, or its right or its wrong, then he is relieved from the responsibility; and the same rule applies to general insanity if the man does not comprehend the nature and quality of that which he does and the right or the wrong, then he is relieved; if he does comprehend both, then he is responsible for that which he does.

Where the defense of insanity had been interposed, the court after charging the above propositions as to the law of insanity, also charged, if "you have a reasonable doubt, from the evidence in this case, that the prisoner is guilty of this crime, then you should give him the benefit of that doubt, and he should stand acquitted; if you have no such doubt, then you should pronounce him guilty." The prisoner's counsel requested the judge to charge "that if from the evidence in the case a reasonable doubt arises in the jurors minds as to the sanity or insanity of this defendant, that he is entitled to the benefit of that doubt." The court refused so to charge. A further request to charge: "The defense are not required to establish, beyond a reasonable doubt, the insanity of the prisoner. If the evidence raises a reasonable doubt whether he was insane or not, he is entitled to that doubt," was also refused:

Held, that the charge was a complete and correct charge upon the subject of insanity, and the requests to charge were properly refused.

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Held, also, that the charge as made being correct, the prisoner's counsel had no right to request, nor was it the duty of the court to repeat in substance such charge in different form and words.

Held, further, that the requests to charge was too broad and does not accord with the law as it exists in this state.

Fourth Department, General Term, May, 1881.

Before LEARNED, P. J., BOCKES and BOARDMAN, JJ.

ON the 11th day of February, 1879, at the city of Albany, the respondent, John O'Connell, made an attack upon his wife with an iron plow coulter, struck her several blows upon the head and one upon the neck. The blows upon the head cut through to the bone and fractured the skull. He was indicted for an assault with a deadly weapon, with intent to kill. He was thereafter tried, convicted, and on the 24th day of November, 1880, sentenced to state prison for three years. On the trial it appeared that he was of a nervous, excitable disposition, easily angered; that these characteristics were heightened by liquor. The defendant showed that he had formerly owned considerable property; that he had lost it by foreclosures some two years before this; that he claimed to have been cheated out of it; got excited when talking about it; that since losing his property he had taken to drinking; that upon the day in question he had been drinking, and that immediately after the assault he appeared to be much excited. The medical testimony was to the effect that he was of sound mind, and that the acts and appearance of the respondent, as testified to by other witnesses, did not indicate insanity. Upon the question of insanity the court charged as follows: "But he does interpose a defense, and that is, whether he did this injury or not, no matter what the motive may have been which actuated it, or the instrument which he used, yet he is not responsible in the law; he should not be condemned for the reason he was irresponsible; that he was an insane man at the time it is alleged this occurrence transpired. You are to

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determine from the evidence whether or no such is the fact. The presumption of law is in this instance against the prisoner, as in the other it was in his favor. He is presumed innocent of the performance of an act until he is proven to be guilty. He is presumed to be a sane man and amenable to all the appliances of the law until he convince you by evidence that he is insane, and he is responsible for the appliance of the law until he relieves himself by convincing you that he is insane and not responsible. And by insanity it is to be understood, in the sense of the law, a diseased condition of the mind and conscience of the person so as not to be able to comprehend the nature and quality of the act which he does, and so that he is not able to determine the right or wrong of that act. If he can determine those two, the nature and quality of the act, and is able to determine whether or no that act is right or wrong in the light of God's law, then he is not insane, and is not relieved from the responsibility attaching to the act which he does. Drunkenness in itself, simple drunkenness, whether it is of limited measure or whether it is excessive, does not constitute insanity, and does not excuse a person committing an act from the responsibilities of that act. If a crime is committed it does not relieve him from the responsibility of that crime. And intemperance only amounts to a justification in the light of insanity when insanity has been brought about as a result of continued and, perhaps, excessive use of liquors, in a derangement of the mind which is accompanied to a greater or less extent with a derangement of the body, so that the normal condition is overcome and the mind is rendered incapable of considering the nature and quality of acts and the right or wrong of them; or when the use of the liquor is so excessive for the time being as to result in a temporary mania and condition that is known in the books and in common speech among the people as '*delirium tremens*.' If such is the condition of a party doing an injury — if he is in a state of *delirium tremens* at the time, and is, therefore, rendered unable to determine the nature of the quality of the

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act, or its right or its wrong—then he is relieved from the responsibility; and the same rule applies to general insanity. If a man does not comprehend the nature and quality of that which he does, and the right or wrong, then he is relieved; if he does comprehend both, then he is responsible for that which he does. I think I have said all that is necessary for me to say so far as the rules are concerned by which you are to be guided in determining this issue. You are to do it impartially and justly. You are to have no sympathy for the prisoner only as he demands it in the evidence itself; and you are not to visit him with any vindictive feeling because you may conceive that somebody has been injured and possibly he may have been the person to inflict the injury. Justice is supposed to be blind in that respect. You are to look upon the evidence, and that alone, and determine exactly where the truth lies, and so decide without any favor or without feeling. If you have a reasonable doubt from the evidence in this case that the prisoner is guilty of this crime, then you should give him the benefit of that doubt, and he should stand upon his acquittal; if you have no such doubt, then you should pronounce him guilty.” At the conclusion of the judge’s charge, defendant’s counsel requested the court to charge, “that if, from the evidence in the case, a reasonable doubt arises in their minds as to the sanity or insanity of this defendant, that he is entitled to the benefit of that doubt.” The court declined so to charge. Defendant’s counsel also asked the court to charge “that they are not to establish, to their satisfaction, sanity. I understood you to charge we were to establish, to their satisfaction, his insanity. I ask you to charge the defense are not required to establish, beyond a reasonable doubt, the insanity of the prisoner. If the evidence raises a reasonable doubt as to whether he was insane or not, he is entitled to that doubt. The court refused so to charge. And it is upon these refusals to charge, and upon an exception to that portion of the charge in which the court says, “defendant is bound to show insanity to satisfaction of the

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jury," that it is understood the respondent relies for a new trial.

D. Cady Herrick, district-attorney, for plaintiff in error. Under the statute the defendant must be insane to escape liability for his acts (2 *R. S.* [6th ed.], 988, sec. 2). But that insanity must be such that he cannot distinguish right from wrong at the time of and with respect to the act complained of (*Willis* agt. *The People*, 32 *N. Y.*, 715; *Flannagan* agt. *People*, 52 *N. Y.*, 467; *People* agt. *Brotherton*, 75 *N. Y.*, 159). There is no testimony in the case amounting to evidence of insanity. Mere wildness and excitability are not evidences of insanity (*Willis* agt. *People*, 32 *N. Y.*, 715; *Walter* agt. *People*, 32 *N. Y.*, 147; *Ferris* agt. *People*, 35 *N. Y.*, 125-129). The court is not bound to charge upon abstract questions (*Ferris* agt. *People*, 35 *N. Y.*, 125; *Walter* agt. *People*, 32 *N. Y.*, 147; *Moody* agt. *Osgood*, 54 *N. Y.*, 488; *Slatterly* agt. *People*, 58 *N. Y.*, 354). The court charged fully in regard to the question of insanity, and also in regard to reasonable doubt. When the jury has been instructed upon every question material to the disposition of the case, the court may decline to give further instruction (*Walter* agt. *People*, 32 *N. Y.*, 147; *Ferris* agt. *People*, 35 *N. Y.*, 125; *Moody* agt. *Osgood*, 54 *N. Y.*, 488; *Slatterly* agt. *People*, 58 *N. Y.*, 354; *Morehouse* agt. *Yeager*, 71 *N. Y.*, 594; *Rexter* agt. *Storin*, 72 *N. Y.*, 601). It is not the duty of trial judge to present the matter to the jury in every possible phase and in every form of language which the ingenuity of counsel can devise (*Moet's Case*, *Ct. App.*, *MS.*). The request to charge was too broad. Simply being insane does not relieve a man from responsibility. The test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act complained of (*Flannagan* agt. *People*, 52 *N. Y.*, 467; *People* agt. *Brotherton*, 75 *N. Y.*, 159; *Moet* agt. *People*, *Ct. of App.*, *MS.*). Insanity is a defense. It is no part of the act or acts

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complained of. It is an extrinsic fact which, if established, is a defense by avoidance. It is a fact to be proved by the one asserting it. Raising a doubt in regard to the existence of a fact is not proving that it exists (*People agt. Schryver*, 42 *N. Y.*, 1, see p. 9; *Wharton's Crim. Ev.*, sec. 321, and cases cited). The defendant in this case, relying upon the defense of insanity alone, was bound to prove it (*Regina agt. Dayton*, 4 *Cox C. C.*, 149; *Commonwealth agt. Heath*, 11 *Gray*, 303; *Commonwealth agt. Eddy*, 7 *Gray*, 583; *State agt. Coleman*, 27 *La. Ann.*, 691; *In the Matter of Insane Criminals*, 8 *Scott's N. R.*, 595; 1 *C. & K.*, 130, note). There must be a preponderance of evidence of insanity to overcome the presumption of sanity (*Boswell agt. State*, 63 *Alabama*, 307; *Ost mire agt. Commonwealth*, 76 *Penn.*, 414; *State agt. Redemeier*, 71 *Mo.*, 173). It is not sufficient to raise a reasonable doubt. He must satisfy the jury that he was insane at the time the act was committed (*Baccigalupo agt. Commonwealth*, 33 *Grattan*, 807; *State agt. Strander*, 11 *W. Va.*, 745, 823). The proof of insanity ought to be as clear and satisfactory as the proof of committing the act ought to be to find a sane man guilty (*State agt. Spencer*, 1 *Zabriskie*, 202).

J. H. Clute, for appellant. The judge erred in charging the jury that the defense of insanity is an affirmative defense, and that the prisoner is bound to satisfy the jury, by proof, that he was insane. The judge erred in refusing to charge the jury that if, from the evidence in the case, a reasonable doubt arises in their minds as to the sanity or insanity of defendant then he is entitled to the benefit of that doubt. This request was put in different forms, and each time an exception was taken to the refusal of the court to charge as requested. This was error, for which a new trial must be granted (*Brotherton agt. The People*, 75 *N. Y.*, 159; *The People agt. McCann*, 16 *N. Y.*, 70; *Wagner agt. The People*, 2 *Keyes*, 694).

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BOARDMAN, *J.* — The prisoner was convicted under an indictment for an assault to kill. An attempt was made to show he was insane at time of the assault. At the close of the charge the prisoner's counsel requested the judge to charge "that if from the evidence in the case a reasonable doubt arises in the jurors' minds as to the sanity or insanity of this defendant, that he is entitled to the benefit of that doubt."

The court: "No; I decline to charge that." A further request to charge, "the defense are not required to establish beyond a reasonable doubt the insanity of the prisoner. If the evidence raises a reasonable doubt whether he was insane or not, he is entitled to that doubt." The court: "I decline to charge that." The prisoner's counsel excepted to such refusal to charge.

The evidence required the submission of the prisoner's sanity, at the time of the offense, to the jury, and it was submitted in the following language, taken from the charge: "You are to determine from the evidence whether or no he was insane at the time of this occurrence. The presumption of law is in this instance against the prisoner, as in the other it was in his favor. He is presumed to be innocent of the performance of an act until he is proven to be guilty. He is presumed to be a sane man and amenable to all the appliances of the law until he convinces you by evidence that he is insane; and he is responsible for the appliances of the law until he relieves himself by convincing you that he is insane and not responsible. And by insanity is to be understood, in the sense of the law, a diseased condition of the mind and conscience of the person, so as not to be able to comprehend the nature and quality of the act which he does, and so that he is not able to determine the right or the wrong of that act, and is able to determine whether or no that act is right or wrong in the light of God's law, then he is not insane and is not relieved from the responsibility attaching to the act which he does. Drunkenness in itself, simple drunkenness, whether

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it is of limited measure, or whether it is excessive, does not constitute insanity, and does not excuse a person committing an act from the responsibilities of that act. If a crime is committed it does not relieve him from the responsibility of that crime. And intemperance only amounts to a justification in the light of insanity, when insanity has been brought about as a result of continued and perhaps excessive use of liquor, in a derangement of mind which is accompanied to a greater or less extent with a derangement of the body, so that the normal condition is overcome and the mind is rendered incapable of considering the nature and quality of acts and the right or wrong of them; or when the use of the liquor is so excessive for the time being as to result in a temporary mania and condition that is known in the book and in common speech among the people as '*delirium tremens*.' If such is the condition of the party doing an injury, if he is in a state of *delirium tremens* at the time, and is therefore rendered unable to determine the nature or the quality of the act, or its right or its wrong, then he is relieved from the responsibility; and the same rule applies to general insanity; if the man does not comprehend the nature and quality of that which he does, and the right or the wrong, then he is relieved; if he does comprehend both, then he is responsible for that which he does. If you have a reasonable doubt from the evidence in this case that the prisoner is guilty of this crime, then you should give him the benefit of that doubt, and he should stand upon his acquittal; if you have no such doubt, then you should pronounce him guilty." This was a complete and correct charge upon the subject of insanity. It presents the issue fairly, and as the prisoner's counsel now claims the law to be. It says, in substance, the sanity of the prisoner is presumed. His insanity, his inability to distinguish between right and wrong in reference to the act done at the time when it was done, must be proved to the satisfaction of the jury. But if on the whole evidence the jury have reasonable doubt whether the prisoner

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is guilty of the crime charged you must acquit him. If you have no such doubt then you should convict him. The charge as made being correct, had the prisoner's counsel the right to request, and was it the duty of the court to repeat, in substance, such charge in different form and words? Is it to be tolerated that counsel may ask a judge to repeat by way of emphasis in a modified form certain portions of his charge? It ought not to be so, and the authorities seem to say it is not so. Says REYNOLDS, C., in *Moody* agt. *Osgood* (54 N. Y., 494): "The jury had before been properly instructed in everything necessary to a proper disposition of the case. It was sufficient that the present case, upon the law and the evidence, was properly submitted to their judgment. This was all, I think, the judge was required to do, and there must be a period of time when a circuit judge may properly decline to entertain any further application from either party to give further instructions to the jury, and that period is ordinarily reached when after the close of the evidence in a cause the jury have been properly instructed upon every question material to the disposition of the case" (See, also, *Holbrook* agt. *U. and S. R. R.*, 12 N. Y., 236, 244; *Decker* agt. *Mather*, *Id.*, 313, 320, 324; *Moorhouse* agt. *Yager*, 71 *id.*, 594; *Rexter* agt. *Haim*, 73 *id.*, 601). But there is a further answer to the requests to charge. The mere fact that a person is insane does not *per se* relieve him from responsibility. The test is, whether he is capable of distinguishing "between right and wrong at the time of and with respect to the act complained of" (*Flanagan* agt. *People*, 52 N. Y., 467, 469; *Willis* agt. *People*, 32 N. Y., 717; *Wagner* agt. *People*, 4 *Abb. C. of A. Cases*, 511; *People* agt. *Montgomery*, 13 N. S., 209). MULLIN, P. J., at page 246, says: "A man may be insane and yet be capable of distinguishing between right and wrong. It is only when the insanity has taken possession of the whole mind so as to obliterate altogether the capacity to make this distinction that he becomes responsible." Again (*pp.* 247, 248): "Proof that the accused was insane when the

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crime was committed is not enough to require a jury to acquit. It must be shown that the insanity was such as to destroy, for the time at least, the consciousness of the distinction between right and wrong" (*Brotherton agt. The People*, 75 N. Y., 159).

We conclude the prisoner's counsel had no right to request a further charge upon the subject of the prisoner's sanity, and for that reason the judge properly refused to charge as requested. The request to charge was too broad and does not accord with the law as it exists in this state, and for that reason the request was properly refused.

The conviction and judgment should be affirmed.

See 27

SUPREME COURT.

THE PEOPLE, respondents, agt. JULIA COFFEE, appellant.

Criminal law — Confinement of disorderly persons and vagrants in Albany county penitentiary proper and lawful — Code of Criminal Procedure, sections 892-903 — Chapter 183, Laws of 1847, not repealed.

The confinement of disorderly persons and vagrants in the Albany county penitentiary is proper and lawful, notwithstanding the provisions of sections 892 and 903 of the Code of Criminal Procedure.

Chapter 183 of the Laws of 1847 is not repealed by the provisions of these sections, but remain in full force and validity (*See Matter of Wachter, ante*, 352).

Third Department, General Term, November, 1881.

On the 10th day of September, 1881, the above named defendant, Julia Coffee, was duly apprehended and brought before William K. Clute, esq., a police justice of the city of Albany, charged as a vagrant within the meaning of section 887 of the Code of Criminal Procedure. The defendant pleaded guilty to the charge, on the same being stated to her, and was duly convicted thereof and sentenced to imprison-

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ment in the Albany county penitentiary for the term of thirty days at hard labor. Wherefore the said justice duly made up and signed a certificate of conviction in due form of law, and immediately caused the same to be filed in the Albany county clerk's office.

The said justice then made up and signed a warrant committing the said defendant to the Albany penitentiary for the said term of thirty days at hard labor, under which she was imprisoned. That thereafter, and on the 10th day of September, 1881, the defendant sued out a writ of *habeas corpus*, returnable before Hon. ANTHONY GOULD, recorder of Albany, claiming that said imprisonment was illegal, on the ground that under the new Code, section 892, the imprisonment should have been in the Albany county jail, instead of in the Albany county penitentiary, which was the only question raised by the defendant.

The recorder denied the motion to discharge the defendant, and remanded her to the penitentiary and rendered the following decision :

Galen R. Hitt, for relator.

D. Cady Herrick, district-attorney, for people.

GOULD, *Recorder*.—Julia Coffee was, on the 10th day of September, 1881, tried and convicted before William K. Clute, esq., police justice of the city of Albany, of being a vagrant, and was thereupon sentenced to be confined in the Albany county penitentiary for the term of thirty days at hard labor. Upon the same day she sued out this writ before me through her counsel, who upon the return thereto claimed her detention to be illegal and void, since section 892 of the Code of Criminal Procedure specifically provides that vagrants, if notorious, and so this petitioner had been shown to be, should, except in the city of New York, be committed to the jail of the county in which the conviction had occurred. Reference

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was also made by him to section 903 of the same Code, which similarly provides regarding disorderly persons, and thus by analogy seems to indicate more clearly the intention of the legislature.

Chapter 152 of the Laws of 1844, authorized and directed the erection of a penitentiary in the county of Albany for the confinement of certain criminals. Chapter 183 of the Laws of 1847, contained the following provisions:

“§ 2. It shall be lawful for any justice of the peace in the county of Albany to commit any person, who shall be convicted before such justice as a disorderly person, to the penitentiary instead of the jail of the county of Albany.”

And “§ 3. It shall be lawful for any justice of the peace or other magistrate having jurisdiction thereof in the city or county of Albany, in all cases of complaints for vagrancy, to commit any person convicted upon such complaint before said justice or magistrate, to the said penitentiary for a term not exceeding six months.”

The conviction herein of Julia Coffee was under and pursuant to the third section, above quoted, of this law.

The question, therefore, the determination of which this writ demands, is as follows: Does the Code of Criminal Procedure repeal these sections, and must vagrants and disorderly persons be committed hereafter to the county jail?

In construing statutes, regard must be had for the intention of the legislature. Successive statutes upon the same subject must be considered together, and where they appear to contradict each other, they must, if possible, be so construed that each will stand. The legislature from time to time has passed statutes regarding the Albany county penitentiary. It has, by separate acts, authorized prisoners from certain other counties in the state to be there confined, and has designated it as a proper place for the detention of young criminals. Prior to 1844, persons convicted of minor offenses in this county were committed to the county jail. What intention was evinced by the legislature in passing these successive acts

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authorizing the erection of the penitentiary and directing that persons thereafter so convicted should be there confined? It recognized, I think, that there was a need for this institution. It indicated that for the purpose of imprisonment it was to be considered a jail and the place best suited for the detention of those convicted of minor offenses. It showed that "county jail" and "Albany county penitentiary" are not inconsistent terms, but that the latter includes the former, and is an improvement upon it. Did the legislature, then, in passing this Code, intend to undo its former work and retrograde forty years? When statutes seem inconsistent and doubtful, and the question of appeal is to be determined, recourse must be had to a consideration of the old law, the mischief and the remedy, and where no mischief exists, there no remedy need be applied. This seems to be the present case. The legislature has clearly indicated that the penitentiary is an improved jail or place of imprisonment for minor offenses, and I do not think that by these sections of the Code now in question it intended to destroy its own creation.

Furthermore, these acts relating to the penitentiary are all special and local, while the Code is a general statute. A special statute should be expressly repealed. It is passed to serve some certain purpose, and is an exception to any general law which, at the time of its passage, may exist. It is definite in its design, and its intention is clearly manifest to the enacting legislature. Future legislatures can repeal it, but its abrogation should be beyond all doubt. Courts have, at all times, frowned upon its repeal by implication. In 50 *New York*, 493, it is held that "a special and local statute, providing for a particular case or class of cases, is not repealed or amended, as to some of its provisions, by a statute general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter."

In 59 *New York*, 38, judge ALLEN says: "Laws special

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and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestations of an intent by the legislature to effect such repeal, and ordinarily, an express repeal by some intelligible reference to the special act is necessary to accomplish that end." And 69 *New York*, 209, a case in which the opinion is delivered by the same judge, further strengthens and enforces these views.

And the legislature has had regard for the censure and advice of the courts. When the present Code of Civil Procedure was passed, the former acts thereby intended to be repealed were expressly mentioned. It is a fair inference that in a similar case, such as the passage of this Criminal Code, the same care would be taken in regard to the repeal of special statutes. But this was not done. The Code prescribes the procedure in all criminal cases, it uses the word "jail" in those sections above mentioned, but it clearly and only refers to the place of confinement provided by a county for detention of prisoners convicted of certain offenses. For section 962, the next to the last in the Code, expressly provides "that if in any local statute, confined by its terms to a town or village, or to a county or city other than the city and county of New York, any proceeding is prescribed in addition to those prescribed by this Code and not inconsistent with it, the same shall remain unaffected by it."

This, as being the latest expression of the will of the legislature in the passage of this act must prevail, and I think that under it and upon a careful construction of the successive statutes, the confinement of disorderly persons and vagrants in the Albany county penitentiary is proper and lawful, and that chapter 183 of the Laws of 1847 is not repealed, but remains in full force and validity.

I therefore deny the motion herein and remand the prisoner.

NOTE.— On appeal the judgment was affirmed by the general term upon the same grounds set forth in the foregoing opinion, and in the opinion of judge WESTBROOK, in *The Matter of Wachter* (*ante*, 352), no opinion was written.—[ED.]

Jones agt. New York Central and Hudson River Railroad.

SUPREME COURT.

BRIDGET JONES, administratrix, &c., agt. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Negligence — Contributory negligence — Evidence — In action for negligence, plaintiff must show affirmatively that the negligence of defendant was the sole cause of the injury — What evidence necessary — Legitimate and proper inferences to be drawn from the evidence is for the jury.

Although in an action for negligence it is necessary for the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the injury complained of, it is not necessary that this be done by positive and direct evidence, proof of circumstances from which the inferences may fairly be drawn is sufficient.

Not only is the truth of evidence for a jury, but the legitimate and proper inferences to be drawn therefrom are also for them.

Where the answer conceded that the fall occurred whilst the deceased was in the discharge of his duty as a brakeman, and the legitimate inference from the proof was that he fell by reason of the round giving way :

Held, that the two — the admission and the proof — together establish that the deceased, in the discharge of his duty, and for the purpose of such discharge of duty, took hold of the round which, owing to an old break, easily discoverable by the defendant if an inspection had been made, and not seen by the deceased on account of the darkness of night and the necessary haste of its use, gave way, causing him to fall and be crushed by the train.

Held, also, that these facts establish both the negligence of the master and the freedom from negligence of the servant, and throws upon the master the entire responsibility of the accident.

Special Term, December, 1881.

MOTION for a new trial on a case.

Parker & Countryman, for plaintiff.

Samuel Hand, for defendant.

WESTBROOK, J. — It was conceded upon the trial of this action that William Jones, the husband of the plaintiff, was

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on the 7th day of February, 1879, a brakeman in the employ of the defendant, "and that," as the answer expressly admits and avers, "while engaged in the discharge of his duties as such brakeman the said William Jones fell to the ground under a train of cars which was running from East Albany to West Albany and was killed."

The cause was tried at the Albany circuit in January, 1881, and resulted in a verdict for the plaintiff of \$4,500.

The particulars and the cause of the death as averred in the complaint were that while the deceased was so engaged in the discharge of his duties as a brakeman upon a train of freight cars which the defendant on the day above mentioned was moving between the points, also above stated "he took hold of or stepped on one of the iron steps or bars attached to one of said freight cars for the purpose of being used as a ladder in climbing on and off said car, which said iron step or bar had become and then was defective and unsafe by reason of long use and strains, and was then cracked and partially broken, which said defects were unknown to the said William Jones, and said bar or step, in consequence of such defects, gave way letting the said Jones fall to the ground under said train of cars, part of which passed over and crushed him and instantly killing the said William Jones."

The proof given upon the trial was sufficient to justify the jury in finding that the cause of the accident was a defective bar or step as charged in the complaint. A light snow had fallen before the accident. At a point on the track, where the trampled appearance of the snow indicated that some one had fallen to the ground, was found the iron round of a ladder of a freight car which was bent, and the appearance of its ends showed an old break almost severing it from its connections with the car, whilst the part newly broken was distinctly visible, and evidently the part of the iron unsevered by the old blow which had bent the round and broken it almost off at both ends was not sufficient to withstand the strain of a man's weight if thrown upon it. Near the same point also

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were found the stick and other articles of the deceased, and from it to the spot where the body of the deceased was found were marks upon the snow showing its dragging. The appearance of such dragging began, as just stated, at the place where the snow was trampled and the round found, and ended at the point where the body lay.

The cause was sent to the jury with the following charge: "To recover in an action of this character, and therefore to entitle the plaintiff to recover in this action, it must be affirmatively shown that the negligence of the defendant caused the accident and that the deceased was free from contributory negligence. In stating to you this general rule of law I wish to be understood that you are to find the negligence of the defendant and the absence of negligence on the part of the deceased in the proof. You are not to guess it; you are not to surmise it, but you are to find it in the proof. Not that necessarily there must have been a person present who saw the accident and who can detail all the particulars to you, but in the absence of direct evidence there must be circumstances from which you can legitimately and properly infer the negligence of the defendant and the absence of contributory negligence on the part of the deceased."

It will be observed that the charge distinctly recognizes the rule of law now understood to be well settled that upon the plaintiff devolves the duty of showing affirmatively that the deceased was free from contributory negligence, and that such fact must have been found by the jury. The application for a new trial is upon the ground that there was no evidence from which the inference of the absence of contributory negligence could be legitimately drawn, because, as was argued for the defendant, conceding the manner of death to be as plaintiff claimed, there was an entire absence of proof to show how or in what manner the deceased was using the ladder when it gave way.

There certainly is great plausibility and force in the point, and I was at one time strongly inclined to hold that there

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should be a new trial granted. Subsequent examination and reflection, however, satisfy me that a second verdict in favor of the plaintiff should not be disturbed for the following reasons :

First. Not only is the truth of evidence for a jury, but the legitimate and proper inferences to be drawn therefrom are also for them.

Of the extent to which this rule has recently been carried in this state, the case of *Hart agt. The Hudson River Bridge Company* (80 *N. Y.*, 622) affords a good illustration. The action was tried before myself, and with the facts I am perfectly familiar. The plaintiff was nonsuited because, as I supposed, there was an entire absence of proof to show how the deceased fell, if she fell at all, through the opened draw of the defendant's bridge, and consequently the freedom of the deceased from contributory negligence was entirely unproved. The appellate tribunal must therefore have reached the conclusion that the only facts which were shown, to wit, the starting of deceased from East Albany to return to Albany in time to have reached the opened draw ; the splashing as of something falling in the river ; the wetting of the pier above the surface of the water, and the spot where the body was found, were sufficient to take it to the jury, and if sufficient for that purpose, then, of course, they were also ample to sustain a verdict for the plaintiff if one had been so found.

The present case certainly presents more facts for the consideration of a jury than that of *Hart* did, and as two juries have concurred in finding for the plaintiff on this very question, this, the second verdict, should not be disturbed.

Second. If the case stood upon the proof only, and the *Hart* case did not control my action, the point made by the defendant would to me be unanswerable. The only inference which can be drawn from the evidence alone, as it seems to me, is that whilst the deceased was using the ladder for some purpose it gave way, and by means thereof he fell and was killed. Under what circumstances and for what purpose he

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used it were unproved, and hence it would be impossible to say from the testimony only whether the use by the deceased of the defective round which caused it to give way was proper or improper, and therefore a conclusion as to how the accident occurred would be a mere guess, and no logical deduction from established facts. What the evidence fails to show, however, the answer admits. That concedes the fall occurred whilst the deceased was in the discharge of his duty as a brakeman, and as the legitimate inference from the proof is that he fell by reason of the round giving way, the two — the admission and the proof — together establish that the deceased, in the discharge of his duty, and for the purpose of such discharge of duty, took hold of the round which, owing to an old break, easily discoverable by the defendant if an inspection had been made, and not seen by the deceased on account of the darkness of night and the necessary haste of its use, gave way, causing him to fall and be crushed by the train. Do not these facts necessarily exclude any theory of carelessness upon the part of the deceased? In other words, if a master sends a servant in the night time up a ladder, which the master by the use of ordinary care would have known was deficient in one of its rounds, and the servant in obeying the order of the master to ascend takes hold of the defective round, which gives way and causes him to fall, do not these facts establish both the negligence of the master and the freedom from negligence of the servant?

Precisely the circumstances which the questions involve, the evidence and the answer in this case establish. The accident occurred in the night time, about eight o'clock, in the month of February. The movements of brakemen on a freight train must be rapid. They continually, in the discharge of their duties, have occasion to go up and down the ladders placed upon each car for that purpose. The deceased fell, the defendant concedes, whilst in the discharge of duty, and he therefore must, as the proof makes clear, have been using the ladder for the purpose of its discharge. Whether he ought,

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in the darkness and haste, to have observed that the round was insufficient to sustain him was clearly for the jury. They have found that he was not negligent in not discovering its condition, and this motion therefore presents the bald case of a defective round of a ladder, of which defect the master should have known and the servant not, giving way whilst the servant is using it in the discharge of duty. This excludes the theory of negligence on the part of the servant, establishes as to him its absence, and throws upon the master the entire responsibility of the accident.

For the reasons stated the motion for a new trial must be denied, with costs.

SUPREME COURT.

ALICE DOUGLASS agt. JOSEPH L. HABERSTRO, as sheriff, &c.

Sheriff—Execution—Teste and return—When error not to vitiate—What irregularities may be amended—When sheriff not entitled to question validity of—Pleadings—Evidence—Special matters not admissible under the general issue—Defenses in action against bail—When not applicable in action against sheriff—Code of Civil Procedure, sections 23, 24, 599, 723, 1366.

In an action against a sheriff to enforce his liability as bail, where it was objected that the plaintiff failed to establish the liability of the sheriff as bail, for the reasons that neither of the executions were tested, and the body execution did not specify the time when it was returnable:

Held, that, though the executions to have been regular should have been tested, and the body execution should have been made returnable within sixty days after its receipt by the sheriff, the omissions were mere irregularities which did not render the executions void.

It seems questionable whether the omission of the teste made them even voidable.

Held, further, that the irregularities are such as might have been amended under section 723 of the Code of Civil Procedure.

The party against whom the executions were issued not having availed himself of such defects, the sheriff cannot take advantage of them.

After the sheriff has by his deputy treated the executions as regular and acted under and made returns to them, he cannot afterwards question

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their validity. Proof that the executions were returned by the direction of the plaintiff's attorney, in order that the service thereof might be prevented, is not admissible under a specific or general denial; they constitute or tend to constitute an affirmative defense, and cannot be proved unless pleaded.

The provision of the Revised Statutes permitting a public officer, when sued for an official act, to give special matters in evidence under the general issue (2 R. S., 353, secs. 14, 15), is no longer in force.

An allegation in the amended answer that "the executions were returned by the deputy having the same in charge, at the request and by the direction of the attorney of the plaintiff in said executions, without the knowledge, privity or consent of defendant (the sheriff)," does not constitute a defense under section 599 of the Code of Civil Procedure.

The return of the execution by the deputy or under sheriff before the return day was the act of the sheriff and was entirely voluntary on his part for aught that is alleged in the answer, and it constitutes no defense, either under the statute or independently of it.

Fourth Department, General Term, October, 1881.

MOTION by the defendant for a new trial on exceptions taken at the Erie circuit, and ordered to be heard at the general term in the first instance.

Osgoodby, Titus & Moot, for defendant.

John Campbell Hubbell, for plaintiff.

SMITH, P. J. — The plaintiff herein sued one Warren, in tort, and caused him to be arrested. The order of arrest was served by the defendant herein as sheriff. Warren put in bail, who were excepted to and neglected to justify, and the defendant thereby became liable as bail. The plaintiff recovered judgment against Warren, and issued a property and a body execution thereon successively, which were returned by a deputy of the defendant. Nothing was collected, and Warren was not found. The plaintiff then commenced this action against the sheriff to enforce his liability as bail.

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It was objected by the defendant's counsel at the trial, and the point is urged here, that the plaintiff failed to establish the liability of the defendant as bail for the reason that neither of the executions was tested, and the body execution did not specify the time when it was returnable. The direction in the latter execution, in that regard, was to return the same "as required by law." The point is not well taken. Doubtless the executions, to have been regular, should have been tested (*Code of Civ. Proc.*, sec. 23), and the body execution should have been made returnable within sixty days after its receipt by the sheriff (*Code*, secs. 23, 1366), but the omissions were mere irregularities which did not render the executions void. It is questionable whether the omission of the teste made them even voidable (*Code*, sec. 24, *last clauses*), but however that may be, the irregularities are such as might have been amended (*Code*, sec. 723; *The Benedict and Burnham Manufacturing Co.* agt. *Thayer*, 20 *Hun*, 547; 21 *Hun*, 615), and the party against whom the executions were issued not having availed himself of such defects, the sheriff cannot take advantage of them (*Forsyth* agt. *Campbell*, 15 *Hun*, 235; *Dunford* agt. *Weaver*, 21 *Hun*, 349). Besides, the defendant as sheriff, having, by his deputy, treated the executions as regular, and acted under and made returns to them, cannot now be heard to question their validity (*James* agt. *Gurley*, 48 *N. Y.*, 163).

The only other question which need be discussed is whether the court erred in rejecting certain evidence offered by the defendant. The defendant's counsel offered to prove that the executions were returned by the direction of the plaintiff's attorney in order that the service thereof might be prevented. The plaintiff's counsel objected that the proof was not admissible under the answer, and the court so held. When that ruling was made, the answer, as we understand the case, contained no averment of the matters so offered to be proved, and the only question was whether they were admissible under a specific or general denial. That they

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were not admissible, is clear. They constituted, or tended to constitute an affirmative defense, which could not be proved unless pleaded. The provision of the Revised Statutes, permitting a public officer when sued for an official act, to give special matters in evidence under the general issue (2 *R. S.*, *secs.* 14, 15) is no longer in force. Mr. justice GROVER said, in *Richtmeyer agt. Remsen* (38 *N. Y.*, 206, 208), that it was repealed by the Code of Procedure. If that Code left it in force for any purpose, it was expressly repealed in 1877, before this action was commenced (*Laws of 1877, chap.* 417, *sec.* 1, *part* 3, *subd.* 5).

After the ruling above stated had been made, the court permitted the defendant to amend his answer, as we read the case, by adding to it a defense in these words: "The defendant alleges that each of the alleged executions set forth in the complaint was returned by the under sheriff and deputies of the sheriff of Erie county, having the same in charge, at the request and by the direction of the attorney of the plaintiff in said executions and this action, without the knowledge, privity or consent of defendant; and defendant denies that said executions were duly issued or duly returned as set forth in said complaint. And this defendant alleges, upon information and belief, that said plaintiff's attorney in the executions and this action, requested and directed said executions to be so returned that he might commence this action against defendant, and that in form the law might seem to be complied with, and that said returns were made at the request and by the direction of said plaintiff's attorney in said executions and this action, as herein stated, and not otherwise." After the answer was so amended the defendant's counsel made several offers of evidence, none of which need be considered except the offer to prove the facts alleged in such answer. Although that particular offer does not appear to have been acted upon in any way at the trial, we gather from the case, and especially from that part of it which immediately precedes the offer, that the trial judge ruled that the

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third or amended answer did not constitute a defense. Was that ruling error?

It is provided by section 599 of the Code of Civil procedure, that in an action against bail, it is a defense that a direction was given, or other fraudulent or collusive means were used, by the plaintiff or his attorney, to prevent the service of an execution against the property, or against the person of the defendant in the original action. The amended answer was evidently drawn with a view of presenting a defense under that section, but it failed to do so. The gist of the defense described in the section is the fraud practiced by the plaintiff in the execution upon the bail. But no fraud upon the sheriff is alleged in the answer, nor could there have been any, in view of the facts alleged, since he was a party to the transaction, by his under sheriff or deputy, whose official act was his own. If the deputy had colluded with the plaintiff or his attorney to defraud the sheriff, a different case would have been presented, but that is not averred. The return of the execution by the deputy or under sheriff, before the return day, was the act of the sheriff and was entirely voluntary on his part, for aught that is alleged in the answer, and it constitutes no defense, either under the statute or independently of it. The offer was properly excluded.

All the other offers, to which reference has been made, either fell short of the allegations in the amended answer or exceeded them, and in either case, were inadmissible.

The motion for new a trial should be denied, and judgment ordered for the plaintiff on the verdict.

HARDIN, J., and HAIGHT, J., concurred.

So ordered.

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SUPREME COURT.

CATHARINE BELLAMY agt. WENDEL GUHL and others.

Mortgage foreclosure — Infants — How personal service must be made upon — Judgment cannot be validated by acts done subsequent to judgment — Code of Civil Procedure, sections 426, 471, 724, 783.

Where, in a foreclosure suit, the summons was personally served upon two of the defendants, minor children, under the age of fourteen, of the mortgagor, who died intestate before the action was commenced, but was not served upon their mother or general guardian :

Held, that the service was not such as to give the court jurisdiction over the person or property of the infants, even though a guardian *ad litem* appointed for them appeared in the action and put in an answer for them ; and a judgment of foreclosure of the mortgage and sale thereunder cannot be validated by acts done subsequent to such judgment and sale.

A judgment entered without service of process is not within the remedial scope of sections 724 nor 783 of the Code of Civil Procedure.

Special Term, January, 1882.

S. C. Ripley, for plaintiff.

Geo. F. Martens, for defendant.

POTTER, J. — This is a motion to correct or validate a judgment of foreclosure of mortgage and sale thereunder.

The purchaser at the sale, doubting the validity of the judgment under which the sale of the mortgaged premises was made, declines to complete the sale.

The ground of the objection to the title is that the service of the summons and complaint upon two of the defendants, viz., Peter C. S. Gould and Josephine Gould, minor children, under the age of fourteen years, of the mortgagor, who died intestate before the action was commenced, had not been made in the manner prescribed by law to give the court rendering the judgment jurisdiction over the person or property of the

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infants. The summons was personally served on the infants, but was not served upon their mother or general guardian for said infants, though I am led to suppose from the papers upon the motion the summons was served upon Wendel Guhl as one of the administrators of the mortgagor's estate.

A guardian *ad litem* was appointed for these infants, who appeared in the action and put in an answer for them, but upon whose petition the appointment was made does not appear from the papers.

There are two questions arising upon this motion :

First. Did the court acquire jurisdiction of the person and property of said infant defendants? If not, can the court grant any order or relief upon the acts done subsequent to the judgment and sale to validate the judgment and sale and give the purchaser at the sale that degree of certainty and assurance of title that any purchaser at a judicial sale is entitled to have?

I am brought to the conclusion that the court had not jurisdiction to render a judgment of sale and foreclosure against the infants named and their property. Section 426, Civil Procedure, prescribes the manner of making service upon infants under fourteen years of age.

Two things are absolutely required — one, that service of the summons shall be made upon the infant, and also upon the father, mother or guardian, if within the state.

It appears the father was dead, and I can only infer that the mother was also dead (the fact is not distinctly stated in the affidavits), but the papers show that the infants have general guardians residing within the state. The statute makes no distinction in the importance and necessity of both these requirements in making service to commence actions against infants under fourteen years of age.

It was held in the court of appeals, in *Ingersoll agt. Mangam* (March 18, 1881), that the omission to make personal service upon the infants even where a guardian *ad litem* appointed upon the petition of the mother of the infants

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appeared and answered for them. The court in that case say, service alone, either on the infant or on the father, mother, guardian or other person mentioned in section 426, subdivision 1, does not constitute personal service within the statute.

Nor is the case under consideration helped out or made good by the fact that a guardian *ad litem* appeared and answered for the infants for these reasons :

First. The court, without two-fold service of the summons in the manner specified in section 426, has no jurisdiction to appoint a guardian *ad litem* (*Ingersoll* agt. *Morgan*, *supra*, and second by sec. 471, *Civ. Pro.*). If the infant is under the age of fourteen years a guardian *ad litem* can only be appointed upon the application of any other party to the action or of a relation or friend of the infant. It is not shown upon this motion who made the application for the appointment of the guardian *ad litem*.

Second. Can the subsequent steps taken in this action give validity to a void judgment and sale under it? Plaintiff, to cure the omission of service upon the general guardian of the infants, has, since the judgment and sale, served such guardian with the summons and complaint, as also the guardian *ad litem*, and with notice of motion to have such proof of service filed as of the date of —, and made a part of the judgment roll, &c.

The plaintiff's counsel has not cited any authority, nor do I think one can be found for so extraordinary procedure.

The proceeding is but little if at all different or less than this to enter up a judgment against a party and sell his property under it, and then to serve him with summons and ask the court to have such services support the judgment and justify all that may have been done under it.

Neither section 724 nor 783, nor the cases cited by plaintiff afford any warrant for such procedure.

A judgment entered without service of process is not within remedial scope of these sections (*Baldwin* agt. *Kendall*, 16 *Abb.*, 355).

Mulcahey agt. Emigrant Industrial Savings Bank.

The motion must be denied, with ten dollars costs and disbursements, and the purchaser released from his bid and restored to what he has parted with in the attempted purchase.

N. Y. COMMON PLEAS.

ELLEN MULCAHEY agt. THE EMIGRANT INDUSTRIAL SAVINGS BANK.

Contract—Deposits in savings bank to credit of K. or F.—Rights of parties do not descend to personal representatives.

Where a savings bank opened an account "with John O'Keefe or Ellen Mulcahey, creditor:"

Held, that the contract means that the money may be paid to either as in the case of a joint deposit. But if one of said persons die the money cannot be paid to his legal representatives but must be paid to the survivor. The reasons stated.

General Term, January, 1881.

Before C. P. DALY, Ch. J., J. F. DALY and BEACH, JJ.

UPON the trial the following facts appeared, to wit, an account was opened with the defendant as follows: "*Dr.* Emigrant Industrial Savings Bank in account with John O'Keefe or Ellen Mulcahey, *Cr.*" O'Keefe subsequently died and letters of administration were issued upon his estate to his widow, and upon presentation of these letters the defendant paid over the entire money on deposit to the administratrix so appointed.

Ellen Mulcahey subsequently sued the defendant to recover the same moneys. Upon the trial before Mr. justice VAN BRUNT the defendant, after proof of the facts, moved to dismiss the complaint.

The court said: "Well, I am inclined to the opinion that you have not carried out your contract; that is the only point in this case. It does not seem to me that any evidence in regard to conversations at the time of the deposit, or at any

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other time in reference to this matter, can change the rights of the parties under that contract. The contract was that the money should be paid to John O'Keefe or Ellen Mulcahey; and that was the agreement. There is no question that if John O'Keefe had taken the whole of this money, no matter how much Ellen Mulcahey might say 'you shan't draw it,' the bank would be protected. The only question is, whether these rights descended to the personal representative of the party making the deposits. John O'Keefe, if living, could have drawn that money from the bank. I am of the opinion that it was in the nature of a personal right and that as long as John O'Keefe or Ellen Mulcahey was alive either party who was living had a right to collect the money from the bank, and that right did not descend to the personal representative. It might be likened to the principle of a partnership. Suppose they had been partners and deposited this fund so that O'Keefe could have drawn the whole, or Ellen Mulcahey could have drawn the whole, the right to draw would not have descended to the personal representative, and it seems to me that was the nature of this contract at the time this money was deposited; and for that reason, it seems to me, the right to draw did not go to the personal representative and did go to the survivor. It seems to me that that is the principle to which it is likened. We must assume, in view of the nature of this contract, that these parties had a joint interest in it in some way or another. There was a joint interest between the two."

Motion denied and a verdict directed by the court for the plaintiff, the exceptions to be heard in the first instance at general term, judgment in the meantime suspended. The verdict was for \$1,697 with interest from March 14, 1873. Upon the hearing at the general term the following opinion was filed:

W. F. Howe, for plaintiff.

John E. Develin, for defendant.

Mulcahey agt. Emigrant Industrial Savings Bank.

J. F. DALY, *J.*— As it is admitted by defendant that Ellen Mulcahey and John O'Keefe were both present at the bank at the time of the deposit of the money which is the subject of this action, that fact, coupled with the opening of the account in the name of both in the manner hereinafter mentioned, is, in the absence of all proof to the contrary, sufficient evidence that the money was the joint property of the depositors, and that the deposit was a joint deposit.

During the life of both the moneys might have been paid to either as joint creditors of the bank. The recital in the pass-book, "*Dr. Emigrant Industrial Savings Bank, in account with John O'Keefe or Ellen Mulcahey, Cr.*," expressed no more than that the moneys might be paid to either, as in the case of all joint deposits. It did not create a several liability, but was merely declaratory of the obligation of the bank and the right of the depositors, as in all cases of joint deposits.

It did not take from this plaintiff, Ellen Mulcahey, the survivor, the right to draw the whole sum, nor give to the personal representatives of John O'Keefe, deceased, the right to draw on presenting the book. The pass book cannot be considered as a written instrument, assignable by either payee, and passing to the representatives of the holder, as in the case of special contracts to pay (*Record agt. Chisun, 25 Texas, 348, cited by appellant*). The right of action is upon the deposit.

As to the objection that the plaintiff made no effectual demand on the bank, because she did not produce the pass book, it appears from the testimony of Hannah Lyons, that defendants had already paid over the fund to Mrs. O'Keefe when plaintiff demanded it, and it appears from defendant's answer that it was so paid to Mrs. O'Keefe on production and transfer by her to the bank of the pass book. It was, therefore, impossible for plaintiff to comply with the by-laws and produce the book, as defendant then had it.

Poultney agt. Bachman.

The exceptions should be overruled, and judgment for plaintiff entered upon the verdict with costs.

C. P. DALY, C. J., and BEACH, J., concurred.

SUPREME COURT.

JOHN H. POULTNEY agt. LEWIS W. BACHMAN, treasurer of Hudson City Lodge No. 142, Independent Order of Odd Fellows of the State of New York.

Benevolent societies — Rights of their members — Actions by or against associations of seven or more persons — Code of Civil Procedure, section 1919.

Under section 1919 of the Code of Civil Procedure an action may be maintained by a member of a benevolent society against the treasurer of such society to recover from the funds of the same, certain moneys alleged to be due him by reason of sickness.

The action was brought against a lodge of odd fellows by one of its members to recover "sick benefits" to which he claimed to be entitled. The plaintiff had joined the lodge years ago, when its by-laws provided that in case of sickness every member should receive a specified sum weekly "during his sickness or disability." Another section empowered the lodge to alter or amend the by-laws whenever deemed expedient. After the plaintiff had been taken sick, and while he was in receipt of the weekly sum allowed him, a by-law was passed reducing the amount of the payments from four dollars to one a week:

Held, that the lodge was bound to continue paying the plaintiff the full amount to which he was entitled when he became sick.

Although the lodge had the right to change its by-laws, yet, whatever sum any member is entitled to when he is taken sick must be treated as a fixed amount, which cannot be subsequently reduced during the continuance of the sickness. The right to this is a vested right which cannot be annulled or varied while the disability lasts.

Columbia Circuit, April, 1881.

Whitbeck, Barhyte & Hauver, for plaintiff.

J. P. Sanders and J. M. Welch, for defendant

Poultney agt. Bachman.

WESTBROOK, *J.*— This action is brought under section 1919 of the Code of Civil Procedure to recover from the fund of the lodge, of which the defendant is treasurer, certain moneys alleged to be due to the plaintiff by reason of sickness, he being a member of such lodge.

The lodge was organized in 1849, and the plaintiff became a member during that year, and subscribed its constitution and by-laws. He was taken sick on October 5, 1875, and has so continued down to the trial. At that time (October 5, 1875), the following by-law (*art. VII, sec. I*) was in force: "Every member, who is not disqualified by article IX of these by-laws, shall, in cases of being rendered incapable by sickness or accident from gaining a livelihood by his individual exertions, be entitled to and receive out of the funds of the lodge, for the first two weeks' sickness two dollars per week; after the first two weeks, if he has attained the scarlet degree, four dollars, otherwise three dollars per week, during his sickness or disability, commencing not more than two weeks anterior to the date of his being reported to the lodge, provided such sickness or disability does not proceed from any immoral conduct on his part, or be occasioned by any constitutional diseases, or bodily infirmity, which shall have been willfully concealed at the time of his admission into the lodge."

When the plaintiff became a member of the lodge the by-laws also contained another and separate section giving the power to "make, alter or amend such by-laws, rules and regulations from time to time, as may be deemed expedient," as in such section is specially provided.

On the 9th day of July, 1878, the section of the by-laws in regard to benefits in cases of sickness above quoted was amended by adding thereto these words, "also provided that in case a brother has been sick, and drawing benefits for twelve months, the lodge shall reduce the same to one dollar."

Up to the passage of the above amendment and for a year thereafter the plaintiff, who had prior to his illness attained

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the scarlet degree, was paid at the rate of four dollars per week, but since July 9, 1879, he has been paid only one dollar per week, which sum the plaintiff received under protest, and by this action seeks to recover the remaining three dollars per week, which he alleges to be his due.

To the recovery claimed by plaintiff several objections have been made, which will now be considered :

First. It is said that no action can be maintained under section 1919 of the Code, because that section is a mere re-enactment of chapter 258 of the Laws of 1849, and chapter 455 of the Laws of 1851, and it was held, as defendant claims, in *Austin agt. Searing* (16 *N. Y.*, 112) by the court of appeals, that these chapters "relate only to those associations or companies which are authorized by acts of the legislature, for the various purposes of banking, insurance, railroads, plankroads, &c., with which our statute books abound since the year 1838."

A reference to the case of *Austin agt. Searing* will show that no such conclusion was reached by the court, though that was the opinion of judge SHANKLAND, one of the judges composing it. The syllabus of the reporter expressly states that as to that proposition the court were in doubt and did not decide it.

In *Tibbetts agt. Blood* (21 *Barb.*, 650), and in *De Witt agt. Chandler* (11 *Abb. Pr. R.*, 459), two general terms of this court have held that the acts referred to did cover associations precisely similar to that one of which the defendant is treasurer; and Mr. Throop, in his note to section 1919 of the Code, expressly states that "in remodelling the provision, these two decisions of the supreme court have been followed." Indeed, the language of the section is so full and clear that the simple reading thereof is a complete answer to the objection we are now considering. The action, according to its terms, can be maintained "against the president or treasurer of such an association to recover any property, or upon any cause of action for or upon which the plaintiff may maintain such an action or special proceeding against all the associates,

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by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally." It cannot be denied that the funds of the lodge of which the defendant is treasurer are the property of the members thereof, or at least that they have an "interest" therein, either jointly or in common. It is at this fund that the action is aimed, for the by-law which has been given provides that, if the plaintiff is entitled to any relief, it is to be received "out of the funds of the lodge." Without the provision of the Code the plaintiff would be compelled to make all his associates who either have in fact or claim to have an interest in the fund of which the plaintiff seeks a part, parties to the action, and to meet just such a difficulty, as well as for other reasons, it was enacted. It is true that the action is not brought to enforce a personal liability against members of the association, but it is brought to recover "property" in which such associates both have and claim an interest against the plaintiff, and it is therefore clearly authorized.

Second. It is claimed that the plaintiff has no standing in court to recover by action, but was bound by the constitution and by-laws of the lodge of which he was a member to appeal to the grand lodge of the state.

This objection is fully answered by the case of *Austin* agt. *Searing* (16 N. Y., 112) before referred to. It was there held that "an agreement by which the members of an association undertake to confer judicial powers in respect to the property in which they have a common interest upon a body of men or officers, to be from time to time selected out of the association at large, as a tribunal having general authority to adjudicate upon alleged violations of the rules of the association, and to decree a forfeiture of the rights to such property of the parties adjudged to have been guilty of such violation, is void" (*See opinion of SELDEN, J., pp. 122, 123, and of BROWN, J., pp. 124, 125*).

Third. It is urged that the change of the by-law confer-

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ring benefits affects the plaintiff, and limits the amount to be obtained by him to one dollar per week.

The argument by which this proposition is sought to be established is, that when the plaintiff became a member of the lodge it had a by-law in force which authorized its members to change, alter or repeal it, or any other by-law, and that the obligation to pay benefits was consequently subject to such power of alteration. Is this reasoning sound?

First. The right of the lodge to change its by-laws is undoubted, but the powers thereby reserved must be exercised in a reasonable manner, and the clause conferring it must receive a reasonable interpretation. It must not be forgotten that the by-law which gives the benefit to a member in case of sickness or disability is absolute in its terms, and there is nothing in its language to indicate that either its continuance or its amount is dependent upon the caprice of two-thirds of the members of the lodge. The power to change the amount, if it exists at all, is conferred by a separate and independent section. The question, therefore, which this action presents is not, can the plaintiff recover, when the amount which he demands was, in the words of the promise, payable only at the pleasure of his associates? but it is, can he obtain it, when it was unqualifiedly promised, in spite of the attempted repudiation of the promise, under a power claimed to be conferred by a separate provision authorizing the change of any by-law?

When the plaintiff was taken ill he had been for many years aiding to create, by the payment of assessments and dues, a fund, out of which, by the express terms of the by-law then in force, he was entitled to receive "for the first two weeks' sickness two dollars per week," and "after the first two weeks * * * four dollars * * * per week, *during his sickness or disability.*" By the happening of the contingency provided for — the sickness — the plaintiff's right to that sum — four dollars per week — "during his sickness or disability," became a vested one, of which he could not be deprived. The

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contract is to be interpreted like any other contract of insurance, in which, as a rule, is incorporated a clause giving either the insured or insurer the right to end the risk. It would certainly be a somewhat novel construction of the clause conferring such power of termination, to hold, that, after a loss has occurred to the insured, against which the agreement was to protect, the payment of the sum stipulated for could be either reduced or repudiated by the insurer. Yet this, as it seems to me, is the precise position assumed by the defendant. Upon his becoming sick, as has been before stated, the plaintiff's right to four dollars per week during the continuance of his illness became a vested one, and it would be most unreasonable and unconscientious so to construe the by-law giving the power of amendment, as to confer upon the members of the lodge the authority to deprive him of that to which he had thus become clearly entitled. It is no answer to this argument to say, that the plaintiff has not been wholly deprived of benefits, for if the right to change and alter the by-laws confers the power to reduce the sum stipulated for in the case of sickness after its commencement, then the power is also conferred immediately after a member becomes ill to repeal entirely the by-law conferring benefits, and thus the very object which he had in view in uniting with the lodge can be defeated. There is no distinction in principle between an attempt under a by-law (by which as the defendant claims the power so to do is conferred) to reduce the amount of insurance in case of loss, and its entire repudiation. The defendant became liable to the full extent of the sum stipulated to be paid, and the withholding of a part agreed to be paid is just as contrary to the spirit and terms of the agreement as the retention of the whole.

The construction, therefore, of the power to amend the by-laws claimed by the defense cannot be adopted, because: 1st. It deprives the plaintiff of a sum of money which has become due to him; 2d. It is, therefore, an unreasonable construction of the by-law; and 3d. If sound, it enables an

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association, such as the one of which the defendant is treasurer, to defeat one of the professed purposes of its organization, and to commit a fraud upon those who rely upon its engagements.

Second. The amendment to the by-laws should not be construed so as to have a retroactive operation.

It is true that its language is capable of such a construction, but like any law or statute it should not receive it unless incapable of any other. The language of the amendment is: "Also, provided, that in case a brother has been sick, and drawing benefits for twelve months, the lodge shall reduce the same to one dollar per week." It is not declared, in express and plain words, that this amendment shall apply to the case of a member, who was upon the sick list at the time of its adoption, and without such a declaration explicitly made, it should not be so construed.

Third. Both propositions, which have just been stated as answers to the claim of the defendant, that the plaintiff can only recover the reduced amount of benefits, are maintained in *Gundlach agt. Germania Mechanics' Association* (4 Hun, 339).

In that case the articles of association provided: "Upon the death of one, who has been a member of the association for six months last prior to his death, his widow shall be entitled to receive the sum of four dollars monthly during widowhood."

The plaintiff's husband and the husbands of her assignors died, after a membership of six months immediately prior to their decease. The articles of the association, when such deceased became members, also declared: "A revision or alteration of the articles of the association can be made at a general meeting of the members thereof, by a majority of the votes of the members present."

Subsequent to the decease of such members the association revised and altered the article conferring the benefits upon widows of members so as to read as follows: "Upon the death

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of a member each person who may be a member of the society shall pay to the widow of the deceased member the sum of one dollar."

The adoption of the revised article having been interposed as a defense to the action brought to recover the sum stipulated to be paid by the article in force at the time of the death, upon the review of the case at general term the court (*per* MORGAN, J., pp. 341, 342) said: "It must be conceded, I think, that the provision in favor of the plaintiff was in all respects binding as a contract between the association and her husband. The association undertook to pay to the widow a monthly allowance after his death, if at the time of his death he was a member and had been such member for the preceding six months. After his death it is not perceived how the association can by adopting a new article or by repealing the old one relieve itself from this obligation. But independent of this consideration it is safe to say that the new article does not, in form or substance, attempt to repudiate its obligations where they had already become fixed by the death of one of its members."

I have not found any case in this state criticising or reversing that just cited, nor have I been referred to any. It is clearly decisive of the one now being considered, and is, in my judgment, sound in all its conclusions. The power of alteration of the articles of association was as distinctly and clearly reserved in *Gundlach agt. Germania Mechanics' Association* as it was by the lodge of which the defendant is treasurer; and such power of alteration was as applicable to the case of a widow whose husband had died during membership as to that of the individual who is entitled to a weekly allowance upon becoming sick. There is no difference in principle between the two cases, and if in the one it was good law to say that after the death of the husband "it is not perceived how the association can by adopting a new article or by repealing the old one relieve itself from" the obligation of paying to the widow the sum which the article in force at the

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time of the death stipulated should be paid, then it is also legally correct to say of the present action it is not perceived how the by-law in force at the time of the plaintiff's illness can be modified or repealed so as to deprive him of the benefits for which it expressly provided. And it is also true of the association, defendant in this case, as it was of the one in the other, that the amended by-law does not by plain words "repudiate its obligations when they had already become fixed."

The plaintiff is entitled to recover the balance due to him according to the by-law in force at the time he became sick and disabled.

N. Y. SUPERIOR COURT.

LORIN INGERSOLL, executor, &c., plaintiff and appellant, agt.
ORILAN M. SMITH, defendant and respondent.

Case — how made and settled — Effect of death or disability of judge — When deemed to be settled by lapse of time — Code of Civil Procedure, section 997.

When after judgment was entered an appeal was at once taken, a case made and served and amendments proposed and noticed for settlement, the appellant took no further steps to have the case settled for over three years:

Held, that a motion to then settle the case was properly denied for laches, notwithstanding the judge before whom the case was tried was never afterward able to administer his judicial functions.

Held, further, that although the appellant may not have his case settled by a judge, he may file the case and exceptions which have been settled by lapse of time.

General Term, February, 1882.

Before FREEDMAN and RUSSELL, JJ.

APPEAL from an order denying a motion to settle a case and exceptions.

A. B. Cruikshank, for appellant.

Thomas M. Wyatt, for respondent.

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RUSSELL, *J.* — This action was tried in June, 1878, before the late judge SANFORD and a jury. Judgment was directed in favor of the defendant; it was entered July 10, 1878; an appeal was at once taken; a case was made and served; amendments were proposed and they were noticed for settlement August 20, 1878; judge SANFORD was not in attendance on that day, and it is alleged by the appellant that he never again acted in his official capacity. The fact seems to be that judge SANFORD did hold court for a short time in April, 1879.

The appellant took no further steps either before judge SANFORD or any other judge to have the case settled until after judge SANFORD's death in October last when this motion was made. We think the motion was properly denied on the ground of laches.

The Code (*sec.* 997) permits a party to have a case and exceptions settled under the directions of the court in case of the disability as well as the death of a judge.

The appellant waited until long after it was a matter of public notoriety that judge SANFORD would never be able again to administer his judicial functions.

Under Rule 33, if a party omits within the time limited to notice the settlement of a case before a justice after amendments are proposed, he is deemed to have agreed to the amendments as proposed. This case was, therefore, settled by lapse of time (*Whiting agt. Kimball*, 6 *Bosw.*, 690).

The appellant, therefore, may not have his case settled by a judge, but may file the case and exceptions so settled by lapse of time and pursue his appeal subject to any rights which the respondent may have to move at a general term to dismiss the appeal.

The order should be affirmed, with costs and disbursements.

Havemeyer *et al.* agt. Havemeyer *et al.*

N. Y. SUPERIOR COURT.

WILLIAM A. HAVEMEYER *et al.*, administrators, &c., plaintiffs and appellants, agt. JOHN C. HAVEMEYER *et al.*, defendants and respondents.

Costs — Judgment reversed on appeal “with costs to the defendant to abide event — While issues were pending to be retried, leave was granted to defendant to amend answer upon payment of costs of the action to the present time not including allowances” — Effect of last order — Construction to be given to it.

Where the general term in March, 1878, reversed the judgment which had previously been rendered for plaintiff “with costs to the defendant to abide the event,” and the court at special term on June 4, 1878, while the issues were pending to be retried, granted to the defendants leave to amend the answer upon payment “of the costs of the action to the present time, not including allowances:”

Held, that this language did not expressly nor by necessary implication deprive the defendants of their contingent right to the costs awarded by the general term order, which contemplated not a final and complete disposition of all costs that had accrued up to that time as such, but a compensation to the plaintiffs for the amendment, to be measured by the taxable costs, to which, if successful, they would have been entitled.

General Term, February, 1882.

Before FREEDMAN and ARNOUX, JJ.

APPEAL by plaintiffs from an order affirming the clerk's taxation of costs, and denying a motion for retaxation.

Henry H. Man, for appellants.

Francis N. Bangs, for respondents.

FREEDMAN, *J.* — The question presented depends upon the construction to be given to the order of June 4, 1878.

Under the decisions of the court of appeals in *The Union*

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Trust Company agt. *Whiton* (78 *N. Y.*, 491) sustaining the supreme court in the construction of its order in 17 *Hun*, 593, and *The First National Bank of Meadville, Penn.*, agt. *The Fourth National Bank of New York* (1 *Civ. Pro. R.*, 317), reversing the supreme court for having undertaken (in 22 *Hun*, 563) to construe an order of the court of appeals as it had construed its own order in the case first referred to, it seems clear that this court possesses the power and is at liberty to put its own construction upon the order of June 4, 1878, especially as that order was a discretionary one.

The order — after the defendants had procured, as a matter of strict right, a reversal of the judgment, and while the issues were pending to be retried — granted to the defendants leave to amend the answer upon payment “of the costs of the action to the present time, not including the allowance.”

This language did not expressly nor by necessary implication deprive the defendants of their contingent right to the costs awarded by the order of the general term in March, 1878, reversing the judgment and granting a new trial, with costs to the defendants to abide the event, or to the costs as now taxed, to which under the decisions of *Howell* agt. *Van Siclen* (8 *Hun*, 524) and *Isaacs* agt. *New York Plaster Mills* (43 *N. Y. Supr. Ct. R.*, 397) the defendants are entitled, provided the order of June 4, 1878, did not cut off such right. To hold now that the last named order had that effect would be to put a strained and unnecessarily harsh construction upon it, and one which is contrary to the interpretation already put upon it by this court; for in 44 *New York Superior Court Reports* (p. 171), the general term, upon defendant's appeal, defined the meaning of the order to be “such costs of the trial as would go to the plaintiffs in case there had been a termination favorable to them at the time of the order giving leave to amend.” The condition was not, as the plaintiffs now claim, that the defendants should pay the plaintiffs' costs, and in addition submit to the loss of their own and to the loss of their disbursements, though they

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should finally succeed in the action. Language very different from that which was used would be required to maintain this proposition. Nor can I perceive that the imposition of the condition was in legal effect a final disposition of the costs of the whole litigation on both sides up to that time. The order having been made during the pendency of the issues, and in the exercise of the discretion of the court, and in respect to a matter of pleading merely, it contemplated not a final and complete disposition of all costs that had accrued up to that time as such, but a compensation to the plaintiffs for the amendment, to be measured by the taxable costs to which they would have been entitled in case then and there they had succeeded. The same ruling was made by the special term of this court in *Donovan* agt. *The Board of Education* (reported in 1 *Civil Pro. R.*, 311).

The foregoing considerations distinguished the case at bar from *Provost* agt. *Farrell* (13 *Hun*, 303). In that case the issues had been disposed of, and the judgment under which a right to costs had accrued was set aside and the controversy reopened as matter of favor on the ground of newly discovered evidence on payment "of \$150.61 costs and disbursements of this action and ten dollars costs of this motion." At any rate the supreme court had a perfect right to construe its order under the circumstances as it did, while our right to construe the order of June 4, 1878, in accordance with the views above expressed, as called for by the justice of the case, is equally clear. According to the final determination of the case at bar the plaintiffs never had a case, and consequently they were not only not harmed by the amendment, but sufficiently well compensated for technical reasons for its allowance without subjecting the defendants to the additional loss of their costs and disbursements.

Under all the circumstances substantial justice requires that the taxation should be sustained.

No discrimination can be made between costs as such and disbursements.

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The order appealed from should be affirmed, with ten dollars costs and disbursements.

ARNOUX, J., concurs.

N. Y. MARINE COURT.

FRANK D. SCHUYLER, plaintiff and respondent, agt. MICHAEL ENGLERT *et al.*, defendants and appellants.

Undertaking — Order of arrest — Vacation of order of arrest upon stipulation of defendant not to bring an action for false imprisonment or malicious prosecution — Effect of stipulation.

Where an order of arrest is vacated upon the defendant stipulating not to sue for false imprisonment or malicious prosecution, and the plaintiff ultimately succeeds in the action, such condition and stipulation go to the extent of precluding the defendant from maintaining any action upon the undertaking filed upon obtaining the order of arrest.

General Term, December, 1881.

APPEAL from a judgment rendered at trial term in favor of the plaintiff.

The action was brought by the plaintiff, as assignee of August G. Genez, to recover \$250 damages, on an undertaking given upon obtaining an order to arrest Genez in an action upon contract, wherein fraud was charged as the ground of arrest. The undertaking is in the form prescribed by section 559 of the Code of Civil Procedure. Genez, the defendant in the action, moved to vacate the order of arrest, and an order was entered by consent, granting the motion, "upon the defendant stipulating not to bring an action for false imprisonment or malicious prosecution." The stipulation was given as required, and the action ultimately proceeded to judgment, which was given in favor of the plaintiff and against the defendant therein. The present action is brought upon the theory that the order vacating the arrest furnished the defend-

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ant with a ground of action against the principal and sureties upon the undertaking, notwithstanding the condition not to sue inserted in the order and the stipulation given under it.

The trial judge adopted this theory, and rendered a judgment in favor of the plaintiff for \$150.

C. Fine, for defendants and appellants.

C. H. Machin, for plaintiff and respondent.

McADAM, J. — It is clear that, independently of the order vacating the arrest, the plaintiff's assignor had no right of action, and this order, with the stipulation given under it, in terms release the plaintiff in that action (the principal on the undertaking) from all liability for false imprisonment or malicious prosecution. This liability extended to and embraced counsel fees and the like, because these elements of damage, whether called "special damages" or by any other name, are properly recoverable in an action for false imprisonment or malicious prosecution (*Field on Damages*, 538, 544; *Woods Mayne on Damages*, 559). Having consented to discharge the plaintiff from the actions of false imprisonment and malicious prosecution the plaintiff's assignor (the defendant in that action) has, by necessary implication, discharged the plaintiff therein from all the legal consequences of such an action, including as a necessary incident the right to recover the counsel fees and other expenses incurred in obtaining his discharge from imprisonment, and yet by this suit upon the undertaking he has by a mere change in the form of the action succeeded in recovering a substantial part of the very damages he had previously discharged by a release in which no reservation or exception whatever was made.

The construction which the plaintiff's assignor (defendant in the former action) seeks to put upon the order of the court and the stipulation given under it, when practically applied means substantially this: That they were designed to dis-

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charge the defendant in the original action from arrest on the one hand, and on the other to release in form only the plaintiff who caused the arrest from its consequences, so that the defendant in that action might, nevertheless, obtain his redress for wrongful arrest in a more substantial form of action against the principal and his two sureties upon the undertaking filed upon obtaining the order of arrest.

We think the order and stipulation permit of no such interpretation and that their obvious intent and purpose were to prevent any future litigation concerning the propriety of the arrest which the order set aside, and that the terms employed, "false imprisonment" or "malicious prosecution," were deemed and taken as sufficiently comprehensive to embrace all incidental remedies growing out of the arrest to which the stipulation referred.

The sureties sought to be held upon the undertaking were not parties to the consent upon which the order discharging the arrest was made, nor did they in any manner consent that the plaintiff in the action might be discharged from all liability for false imprisonment or malicious prosecution, nor is it at all likely that they would ever have consented to any arrangement by which the principal to the transaction should be discharged from the principal liability incurred, and that they, as sureties, should be mulcted with costs and expenses which, as between them and their principal, he was primarily liable to pay.

We have failed, therefore, to find any solid legal ground upon which the recovery had herein can be sustained.

The trial judge erred in finding for the plaintiff and his judgment must be reversed and a new trial ordered, with costs to abide the event.

SHEA, C. J., and NEHRBAS, J., concur.

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ERIE COUNTY COURT.

SILAS F. WASHBURN agt. JOHN N. OLIVER.

Costs — Code of Civil Procedure, section 3251 — When the ten dollars, in addition to thirty dollars for trial of an issue of fact, on ground of trial lasting more than two days, should not be allowed—trial completed when finally submitted to jury.

After the proofs are closed, and the case is finally submitted to a court, referee or a jury, the *trial* is completed and finished.

Where the trial was commenced during the afternoon of November twenty-eighth, and the proofs were closed, and the cause fully submitted to the jury, and they retired to consider their verdict about 5 P. M. of the twenty-ninth, and returned into court with a verdict about 10 o'clock A. M. of the thirtieth:

Held, that the trial did not occupy more than two days within the meaning of subdivision 3 of section 3251 of the Code of Civil Procedure, allowing ten dollars extra costs when the trial necessarily occupies more than two days.

Erie County Court, February, 1882.

MOTION by plaintiff for a review by the court of taxation of costs by the clerk as provided by section 3265 of the Code of Civil Procedure, the clerk having allowed ten dollars for trial more than two days.

William L. Jones, for plaintiff for motion.

J. P. Carr, for defendant opposed.

HAMMOND, *Ch. J.*—It appears from the papers presented that the trial commenced during the afternoon of November twenty-eighth, that the proofs were closed, and the cause fully submitted to the jury, and they retired to consider their verdict about 5 o'clock P. M. of the twenty-ninth, and that they returned into court with a verdict for the defendant about 10 o'clock A. M. of the thirtieth.

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Upon the taxation of costs by the clerk, the defendant claimed the ten dollars in addition to the thirty dollars trial fee, upon the ground that the trial necessarily occupied more than two days, in accordance with one of the provisions of subdivision 3 of section 3251 of the Code of Civil Procedure which reads as follows :

“For the trial of an issue of fact, thirty dollars, and when the trial necessarily occupies more than two days, ten dollars in addition thereto.”

It will be seen from the foregoing statement of facts that the trial was commenced and completed, and the verdict rendered and entered by the clerk, and the jury discharged, all inside of forty-eight hours, from the time of the commencement of the trial ; and in view of this how it can be claimed that “the trial necessarily occupied *more* than two days,” is hard to see, as it must be conceded that the trial in fact really occupied but little more than one and one-half consecutive days, from commencement to completion, including the time the jury were out, and until after they had returned and rendered their verdict.

Counsel for defendant insists that fractions of a day are not regarded in law, and that a day commences at midnight and runs until midnight, and that he is entitled to this ten dollars because the trial really occupied fractions of three separate days which should each count for full days.

It is true that as a general rule for the purposes of the service of process, pleadings and notices, the law does not regard fractions of a day, but as to priority between creditors, and to prevent an injustice, the law does regard fractions of a day (5 *Abb. Dig.*, 709, and cases there cited).

In the present case it would be an injustice to the plaintiff to allow the rule as claimed by the defendant, because it would in effect be allowing him for time spent in the trial of the cause, which was not thus spent.

As well might a laborer who is hired by the day to do a certain piece of work, charge for three days labor, when in

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fact he should work one-half of the first day, the whole of the second day, and one-fourth hour of the morning of the third day. It does seem as though any person would contend for such a rule in the case of a laborer; and yet in principle it is very like the rule contended for by the defendant in this case.

But there is another view, which may be taken of the case, which is equally fatal to the position of the defendant, and that is that this trial was completed and ended, and fully finished, upon the afternoon of the second day, when the counsel had each finished their arguments to the jury, the court had given them its charge, and they had retired for deliberation upon their verdict (*Mygatt v. Wilcox*, 35 *How. Pr.*, 410).

I cannot find that the precise point under consideration has ever been decided, and it was not up in the case last cited, but in deciding the case the learned judge uses the following language: "Such trial is not completed until finally submitted to the court, referee or jury," thus holding by fair implication, that when it is thus submitted to the court, referee or jury it is completed.

After the proofs are closed and the case is finally submitted to a court or referee for decision, I think it must be held that the trial is completed and finished, and I see no good reason for holding or applying any other or different rule when the trial is by jury instead of a court or referee.

The motion to strike out the item of ten dollars for trial occupied more than two days is granted, with seven dollars costs of this motion.

N. Y. & Balt. Coffee Polishing Co. agt. N. Y. Coffee Polishing Co. (Ld.)

U. S. CIRCUIT COURT.

THE NEW YORK AND BALTIMORE COFFEE POLISHING COMPANY, complainant, agt. THE NEW YORK COFFEE POLISHING COMPANY (LIMITED), defendant.

Perpetuation of testimony by bill in equity — What must be shown to entitle party to order.

Where a bill was filed to obtain, under section 866 of the United States Revised Statutes, a direction that the testimony of a witness A. might be taken in *perpetuam rei memoriam*, alleging that complainant has been and still is using a certain process for which defendant has letters patent, that such letters patent are void for want of novelty, and in case suit shall be brought by defendant against plaintiff for infringement, the plaintiff relies for its defense upon the testimony of A., who had himself made use of the process years before the patent was issued, that A. is upwards of ninety years old, and that defendant neglects to bring such suit for infringement:

Held (overruling demurrer to bill), that the deposition, if taken, would be admissible in the suit which complainant fears, section 867 not being applicable to testimony perpetuated by direction of the United States circuit court under section 866.

Held, also, that there is a necessity for perpetuating this testimony, because, assuming the United States attorney-general has power to institute a proceeding to annul the defendant's patent for want of novelty, still it rests with the attorney-general and not the plaintiff to say whether such proceeding shall be instituted, and whether A. shall be called as a witness.

Eastern District of New York, January, 1882.

Richards & Heald and Henry P. Starbreck, for complainant.

Goodrich, Dedy & Platt, for defendant.

BENEDICT, J. — This case comes before the court upon a demurrer to the bill. The bill is filed to obtain at the hands of this court a direction that the testimony of a witness named William Newell may be taken in *perpetuam rei memoriam*. The provision of statute under which the bill is filed

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is found in section 866 Revised Statutes, where it is provided that "any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam* if they relate to any matters that may be cognizable in any court of the United States."

The allegations of the bill, which are material on the present occasion, are these: That the complainant has been and still is using in the city of New York a certain process to the use of which the defendant claims the exclusive right under letters patent of the United States. That such letters patent are void for want of novelty. That in case suit shall be brought by the defendant against the plaintiff for infringement of the said patent, the plaintiff relies for its defense upon the testimony of William Newell. That said Newell had himself made public use in the United States of the said process for upwards of twelve years before the said patent was issued. That said Newell is upwards of ninety years of age. That the defendant has neglected and still neglects to bring a suit against the plaintiff for its infringement of said patent, and the plaintiff is unable to bring its rights to a judicial determination.

In support of the demurrer to this bill it is first contended that the proceeding is vain, because the deposition, if taken, will never be admissible in evidence in the suit which the complainants fear. This position is supposed to be sustained by the provision in Revised Statutes, section 867, where it is provided that "any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam* which would be admissible in a court of the state wherein such cause is pending, according to the laws thereof." But the effect of the provision last quoted is misunderstood by the defendant. The provision is intended to permit the courts of the United States to admit in evidence testimony perpetuated according to the laws of the state, and in no wise relates to testimony

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perpetuated by direction of a circuit court of the United States in pursuance of the statute of the United States under which this bill is filed. Testimony so perpetuated is admissible in evidence in accordance with the usages and practice of courts of the United States and by virtue of section 866, but not by virtue of 867. The object of the bill is therefore legitimate and the proceeding not vain.

The next ground taken in support of the demurrer is that the bill does not show a necessity for perpetuating the testimony of the witness in order to preserve the plaintiff's rights, inasmuch as, upon the facts stated in the bill, it would be the duty of the attorney-general, upon the application of the plaintiff, to institute a proceeding in the name of the United States to annul the defendant's patent, in which proceeding the testimony of the witness Newell could be taken with like benefit to the plaintiff as if taken by direction of this court in this proceeding, or in a suit brought by the defendant against the plaintiff.

It may be admitted that in cases of this description the rule is not to sustain the bill if it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation (*Angell v. Angell, Sim. & St.*, 89), but no opportunity to have such a judicial determination appears open to the plaintiff in this case.

Clearly the proceeding by the attorney-general, supposed by the defendant to be possible, is not such an opportunity to bring the matter to a judicial determination as the rule requires. If it be assumed that the attorney-general has power to institute a proceeding in the name of the United States to annul the defendant's patent for want of novelty (*as to which see Attorney-General agt. Rumford Chemical Works*, 9 *Official Gaz.*, p. 1062), still it rests with the attorney-general or the United States attorney and not with the plaintiff to say whether such a proceeding shall be instituted, and if so where and when instituted and whether the testimony of the witness Newell shall form part of the testimony

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in such proceeding. The plaintiff is without power to compel the institution of such a proceeding, and it cannot be known that such a proceeding will ever be instituted.

It is said the presumption is that a public officer will do his duty, but such presumption does not warrant the conclusion that the attorney-general or the United States attorney will as of course institute a proceeding to annul the defendant's patent upon the plaintiff's application and assertion that the patent is void for want of novelty. There is no absolute duty imposed upon the attorney-general or any United States attorney, either by the common law or by any statute, to institute a proceeding to annul a patent issued for an invention when applied to by any party asserting its invalidity for want of novelty.

Besides the right which the plaintiff asserts in this bill is the right to have the validity of the defendant's patent adjudicated upon a consideration of the testimony of the witness Newell in regard to the fact asserted by the bill to be within the knowledge of that witness; and if the plaintiff's application to the attorney-general for a proceeding to annul the defendant's patent would create a duty on the part of the attorney-general to institute such a proceeding no duty to call Newell as a witness would arise. Such a proceeding would be wholly within the control of the attorney-general (*Moury* agt. *Whitney*, 14 Wall., 441), and the most that can be said is that it is possible that the plaintiff's right to the testimony of the witness could be preserved by a proceeding taken in the name of the United States, assuming but not deciding that the power to institute such a proceeding exists. Such a possibility affords no reason for refusing to entertain the bill under consideration.

There must be judgment for the plaintiff upon the demurrer, with leave to answer on payment of costs.

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SUPREME COURT.

LOUIS F. ROBERTSON agt. EDWARD SCHELLHAAS *et al.*

Preferences—*When an order is necessary*—*When should be obtained and served*—*Code of Civil Procedure, sections 791-793.*

Where the right to a preference does not appear in the pleadings, the order giving the preference should be obtained *before* notice of trial, and should be served either *before or with* the notice.

Where a plaintiff first notices the cause for trial, without having obtained the preliminary order as required, he waives his right to a preference.

Special Term, October, 1881.

THIS was an action commenced by attachment, and brought for damages growing out of an alleged breach of warranty in the sale of certain hides at Shanghai, China.

Issue was joined on the 9th day of April, 1881, and the cause noticed for the May circuit; but no note of issue was filed until September 12, 1881, and the cause was again noticed for October. On the 8th day of October, 1881, the defendant served papers in a motion for a commission to take the deposition of certain witnesses at Shanghai, under section 889 of the Code of Civil Procedure.

On the same day the plaintiff served papers in a motion to give the cause a preference on the calendar for trial under Rule 36 of the supreme court, upon the ground that certain goods were held under an attachment. Both motions were made returnable October seventeenth.

Lewis Sanders, for plaintiff.

Charles G. Cronin, for defendants. First. In the regular course of the calendar this cause could not be reached in eighteen months at least, thus giving ample time for the return of the commission from Shanghai. Second. The plaintiff has not complied with the statute relating to preferences: Rule 36 is founded on subdivision 10 of sections 791 and 793 of

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the Code of Civil Procedure, which provides that where the right to a preference does not appear in the pleadings, the order giving the preference should be obtained before notice of trial, and should be served either before or with the notice. The plaintiff having noticed the cause for the May and October circuits, he has waived his right to a preference. Unless the pleadings show sufficient facts to give the cause preference, the preliminary order is required (*Code of Civil Pro.*, sec. 793). Third. The provisions of the Code of Civil Procedure (sec. 17) authorizing a convention of the general term justices to establish rules of practice, does not empower them to make rules which are inconsistent with the provisions of the Code (*Formerly* agt. *McGlynn*, 84 *N. Y.*, 284). Fourth. Inasmuch as the plaintiff did not avail himself of the statute in serving his order for a preference, he should be stayed until the return of the commission as the defendant's motion is made in good faith, and they cannot be charged with laches.

BARRETT, *J.*—The motion for a commission is granted, with stay until the 1st Monday of March, 1882, and the cause set down for trial on day subsequent to the expiration of stay.

SUPREME COURT.

SPENCER ERVIN and others agt. THE OREGON RAILWAY AND NAVIGATION COMPANY and others.

Foreign corporations—When and how may be sued—Non-resident plaintiffs—Code of Civil Procedure, section 1780.

Where a suit is brought against a foreign corporation, though a general appearance by defendant before answering gives the court jurisdiction over its person, it does not necessarily give jurisdiction over the subject-matter of the action, and where some of the plaintiffs are non-residents, the complaint must be dismissed as to them, a case not being made out under section 1780 of the Code of Civil Procedure.

A resident plaintiff, however, where the complaint makes out a cause of action may maintain the suit, though the acts out of which the cause of action arises were done, and the property from the management and

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disposition of which the plaintiff's loss and damage were sustained are beyond the jurisdiction, and the relief within the power of the court to grant may be incomplete.

That the stock of such plaintiff, suing as a stockholder, has not been registered, is no reason why he should not maintain the action.

Special Term, January, 1882.

Z. H. Hubbard, for plaintiff.

F. N. Bangs, for defendant.

VAN VORST, *J.*—The defendant, on whose behalf the motion to dismiss the complaint is made, although a foreign corporation, before answering appeared generally in the action. Such appearance in itself gave the court jurisdiction over the person of the defendant, but not necessarily over the cause of action. For although a defendant voluntarily appears in an action, he may yet object to the jurisdiction of the court over the subject-matter, as is done in this instance (*Burnett* agt. *Chicago and Lake Huron R. R. Co.*, 4 *Hun*, 114; *Carpenter* agt. *Central Park and North and East River R. R. Co.*, 11 *Abb.* [*N. S.*], 416; *Robinson* agt. *West*, 1 *Sand.*, 19).

In respect to the non-resident plaintiffs the complaint must be dismissed, for the reason that as to them the complaint does not make out a case which brings their action within the provisions of either of the subdivisions of section 1780 of the Code of Civil Procedure.

Cases in which actions may be prosecuted within this state against foreign corporations are specified in the section of the Code above referred to, and to those cases the jurisdiction of the court is limited.

With respect to the resident plaintiff, Griffin, however, the case is different. An action may be maintained by a resident of this state "for any cause of action" (*Code*, sec. 1780; *Prouts* agt. *Mich. South. and N. In. R. R. Co.*, 1 *Hun*, 658; *The Atlantic and Pac. Tel. Co.* agt. *Balt. & O. R. R. Co.*, 46 *Supr. Ct. R.* 377).

I do not deem it necessary or proper at this time to present

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an analysis of the facts out of which this plaintiff's cause of action is claimed to have arisen, as disclosed by the complaint, and the opening of his counsel. In substance, however, it may be said of them that upon principle and authority they present questions of which a court of equity may properly take cognizance. The fact that the acts out of which the plaintiffs' cause of action arises were done, and the property, through the management and disposition of which the plaintiffs' loss and damages were sustained, are beyond this jurisdiction, does not deprive the court of the power to hear and determine this case upon the merits.

In cases of fraud, breaches of trust or contract, the jurisdiction of a court of equity is sustainable wherever the person of the defendant be found, although property beyond the jurisdiction be affected by the judgment (*Gardner agt. Ogden*, 22 *N. Y.*, 327; *March agt. Eastern R. R. Co.*, 40 *N. H.*, 548; *Massie agt. Watts*, 6 *Cranch*, 148).

It is not important now to indicate the specific relief to which the plaintiff may in the end be entitled. That will depend upon the facts established on the trial. The complaint makes out a cause of action. The relief within the power of the court to grant may be incomplete, and not commensurate with the injuries and loss sustained, growing out of the fact that material interests affected are outside of this jurisdiction; but that affords no adequate reason why an attempt in that direction should not be made. Efforts in such direction frequently afford only approximate justice.

In so far at least as the defendant is personally concerned, and its property and assets within this state may be impressed, justice may be accomplished.

That the stock of the plaintiff Griffin has not been registered is no reason why he should not maintain this action. He is the legal and equitable owner of the stock. The possession by him of the certificate as owner gives him a complete title. For certain purposes, and for the enjoyment of specific privileges, such as to vote and receive dividends, it

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may be necessary, as between him and the corporation, that he should be registered as a stockholder. But as the absolute owner of the stock, he is, to the exclusion of every other person, entitled to prosecute an action for injury to it, or to himself as the proprietor thereof (*Bagshaw* agt. *The Eastern Union Railway Co.*, 7 *Hare*, 114; *Passott* agt. *Byers*, 40 *Cal.*, 614).

The motion to dismiss the complaint as to the plaintiff Griffin is therefore denied.

N. Y. COMMON PLEAS.

DANIEL S. RIDDLE, plaintiff and respondent, agt. HENRY A. CRAM, defendant and appellant.

Referee in supplementary proceedings — Suit for fees — Referee not allowed to show that property was discovered — Such evidence improper.

A referee appointed in supplementary proceedings suing for fees will not be permitted to show that property was discovered upon the examination, or that the judgment was in consequence paid. His action is upon the statute, and although the answer denies the rendition of any services, such evidence is improper, as it may unjustly influence the jury.

General Term, January, 1882.

APPEAL from an order of the marine court, general term, affirming a judgment entered upon the verdict of a jury, in an action tried before justice McADAM.

The trial judge charged the jury that the plaintiff, if allowed to recover at all, was not entitled to more than three dollars for each day spent upon the business of the reference, that being the sum fixed by the Code in force at the time when the service was rendered. The jury allowed forty-six meetings at this rate, making in all \$138.

H. S. Cram, for appellant.

D. S. Riddle, for respondent.

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VAN BRUNT, *P. J.*— This is an action to recover referee's fees by a referee appointed in supplemental proceedings. The defenses were a denial that the plaintiff ever rendered any services to the defendant and the statute of limitations.

The plaintiff in his complaint alleged the value of the services to be a certain sum, and this was denied by the answer. The evidence shows that the defendant in this action was an assignee of the judgment upon which the supplemental proceedings were had; that he was cognizant of the reference, and that he appeared before the referee and urged that it should proceed, and it was also testified by one of the witnesses, Gerding, that the defendant knew of the reference and approved of it. This was more than was necessary to establish a liability upon the part of the defendant for the fees which he had incurred upon that reference. It was urged upon the part of the appellant that the reference never having been terminated, no cause of action accrued. It would seem that a complete answer to this objection is presented by the evidence of the fact that the proceedings were suspended, and that the judgment upon which the proceedings were founded was paid in full to the defendant and the judgment satisfied.

Several exceptions to the introduction of testimony were taken, some of which seem to be well founded. It is true that the plaintiff alleged a *quantum meruit*, and that the answer denied it, but the theory upon which the plaintiff based his recovery was the compensation fixed by the statute, and had nothing to do whatever with the nature of the services, or with their value, but simply depended upon their rendition. Under such circumstances the evidence in regard to the nature of the services and their value seems to have been entirely immaterial.

The plaintiff in this action had no right to raise the issue of a *quantum meruit*, and although it was denied by the answer, that did not authorize him to introduce proof upon that issue, when the amount which he could recover was

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that which the statute had fixed as compensation for such services.

Therefore, the question in the twelfth interrogatory propounded to the witness Gerding, as follows: "State whether or not the examination of Van Valkenberg disclosed property or showed that he had means to pay the judgment upon which the proceedings had been based?" was clearly improper, particularly when we consider the nature of the answer, which was as follows: The examination of Van Valkenberg disclosed that he had a large amount of money, and it was in consequence of that fact that the judgment was paid.

This testimony may have influenced the jury in determining the question as to whether Mr. Riddle had been employed by Mr. Cram or Mr. Gerding, which was a very material issue in the case as presented by the evidence.

We think, therefore, that the admission of that evidence being erroneous under the theory of the plaintiff's action, the judgment must be reversed and a new trial ordered, with costs to abide the event.

BEACH, J., concurred.

SUPREME COURT.

THE CITY NATIONAL BANK OF DALLAS agt. THE NATIONAL
PARK BANK.

*Preferences — Right to — How and when waived — Code of Civil Procedure,
sections 791-793.*

Where the right to a preference depends upon facts which do not appear upon the pleadings, a copy of the order granting the preference must be served with or before the notice of trial or argument.

By serving a notice of trial before making a motion to have the cause preferred, the right to such preference is waived.

Special Term, February, 1882.

Seifert agt. Schillner.

LAWRENCE, J.—The plaintiffs having served a notice of trial before making this motion have, I think, waived their right to move to have the cause preferred..

The right to a preference depends upon facts which do not appear upon the pleadings, &c., and the Code is express that in such a case a copy of the order granting the preference must be served with or before the notice of trial or argument (*Code, sec. 793*).

Motion denied, with ten dollars costs to abide the event.

SUPREME COURT.

ANN SEIFERT, appellant, agt. MICHAEL SCHILLNER, respondent.

Costs—allowed to plaintiff when defendant had noticed cause for trial but failed to try same, defendant attending pursuant to such notice, he not having noticed it himself.

Where a party gives notice of trial, and then fails to try the cause pursuant to his notice or to countermand it in due season, he will be compelled to pay the opposite party who has omitted to notice the cause, but attends in obedience to the call of the party noticing, the costs of the term (*Reversing S. C., 62 How., ante. Following, Potter agt. Lewis, 18 Wend., 516, n.; Townsend agt. Cowen, 19 Wend., 639; 2 Strange, 797; 1 Term Rep., 696*).

Fourth Department, General Term, January, 1882.

Before SMITH, P. J., HARDIN and HAIGHT, JJ.

APPEAL from an order of the special term denying a motion made by the plaintiff to compel the defendant to pay the costs of the May term of the Oneida circuit, 1881, held at Utica. The cause was noticed for trial by the defendant, but was not noticed by the plaintiff. The defendant did not countermand his notice, nor move the cause when called on the calendar. The motion was denied, as not in "accordance with the rules or practice of the courts or the provisions of the Code of Procedure."

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Oswald Prentiss Backus, for appellant.

I. At common law the plaintiff only could give notice of trial in personal actions. In actions of replevin, writs of prohibitions, writs of error where error in fact was assigned as a ground of error, and where a feigned issue was awarded in chancery, either party might give notice of trial. At an early date the defendant in personal actions had no means of punishing the plaintiff who unreasonably neglected to proceed with the cause. He was permitted, however, after the plaintiff's delay had become unreasonable to make up the record and apply to the court, showing plaintiff's conduct, when a rule was granted directing the trial of the cause by proviso. Trial by proviso obtained its name from a clause in the jury process, which directed the sheriff if two writs came into his hands (from the plaintiff and defendant) to bring the case on by the plaintiff's writ. After a trial by proviso had been granted either party might give notice of trial. Afterwards a remedy was provided which was cumulative, by which the defendant in personal actions was permitted to move for judgment as in case of non-suit. After the advent of this new remedy, trial by proviso fell into disuse because of its expense, and because the new remedy was more convenient and summary. Trial by proviso was in vogue in this state as late as 1827 (*People agt. Bank of Washington*, 7 *Cowen*, 519). In replevin, &c., the defendant was deemed an actor and after issue joined might give notice of trial, and bring the cause on for trial as under the Code. And, in any case, if either party gave notice of trial and then failed to countermand his notice in due season, or try the cause pursuant to his notice, he was compelled to pay the other party the costs of the term (2 *Archbold's Pr.*, 240, 241; 1 *Sellon's Pr.*, 413, *F.* 416, 418; 1 *Dunlap's Pr.*, 550, 556, 585, *note*; *Potter agt. Lewis* 18 *Wend.*, 516, *n.*; *Poltz agt. Curtiss*, 9 *Wend.*, 497; *Doe agt. Roe*, 5 *Hill*, 376; *Dauchy agt. Allen*, 3 *How.*, 212; *Townsend agt. Cowen*, 19 *Wend.*, 639; *Anonymous*, 7 *Hill*, 168; *Wilkinson agt. Poole*, 2 *Strange*, 797; 1 *Term. Rep.*, 696;

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2 *Sand.*, 336 a). Formerly if the party gave notice of countermand in convenient season no costs were allowed (1 *Sellon's Pr.*, 413). Under the present practice, notwithstanding a party countermands his notice, he must still pay all costs which have accrued intermediate the service of the notice of trial and the countermand (2 *Till & Sherman's Pr.*, 436; 3 *Wait's Sup. Ct. Pr.*, 37).

II. Observe the similarities in the old and the new practice. Under the old practice, if plaintiff neglected to proceed with the action defendant might move for judgment (2 *Archbold's Pr.*, 244; 1 *Dunlap's Pr.*, 552). So by section 822 of the Code of Civil Procedure, if plaintiff neglects to proceed the defendant may move for a dismissal of the complaint. Again, at common law either party might give notice of trial in replevin, writs of prohibition, &c. By section 980 of the Code of Civil Procedure, either party may give notice of trial. To decide that the old rule is not applicable is to say that it was an erroneous one. Judge MULLIN, in the case of *Kent agt. Schuyler*, in December, 1880, affirmed the old rule and compelled a party to pay costs for not proceeding to trial pursuant to notice.

III. The courts have always applied the rule to cases where applicable, although new (*Butler agt. Kelsey*, 14 *Johns.*, 342; 3 *How. Pr.*, 211; 6 *Hill*, 234).

IV. It was the customary practice of the old supreme court and court of chancery to compel a party to pay costs in such cases as this (*Supreme Court Rule* 85).

E. L. Stevens, for respondent. Where the plaintiff unreasonably neglects to proceed in the action the court may in its discretion, dismiss the complaint (*Code*, sec. 827). But this relief may be refused if plaintiff excuses his neglect (*Champion agt. Webster*, 15 *Abb.*, 4); or if the defendant has been guilty of such conduct as prevents him from having the effect of the motion (*Id.*, 5). By placing the cause on the calendar and not moving it, the defendant simply waived his

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right to move at special term for a dismissal of the complaint for neglect to prosecute (*Miller* agt. *Ring*, 18 *Abb.*, 244; *Bowles* agt. *Van Horn*, 11 *Abb.*, 84; 19 *How.*, 346; *Perkins* v. *Butler*, 42 *How.*, 101; *McCarthy* v. *Hancock*, 6 *How.*, 28). In the case at bar plaintiff was guilty of laches in not noticing the case for trial. The defendant excuses his failure to move the cause, because otherwise engaged. There is no reported case that holds defendant liable for costs. The defendant acted in good faith. The motion was properly denied.

Held, that the court has power under the present practice to and will compel a party who gives notice of trial and then fails to try the cause pursuant to notice, or countermand it in due season, to pay the costs of the term to the opposite party, who has omitted to notice the cause, but who attends in obedience to the call of the party noticing, prepared to try the case.

Order reversed, with ten dollars costs and disbursements.

N. Y. SUPERIOR COURT.

GEORGE W. TOMPKINS, sometimes known as S. P. FULLER, plaintiff and appellant, agt. ALFRED F. SMITH and others, defendants and respondents.

Arrest — Action to recover money lost in gambling — No right to arrest in such action — Code of Civil Procedure, section 549.

In an action brought under the provisions of the Revised Statutes to recover moneys alleged to have been lost in gaming, the defendant is not subject to arrest, as the statute does not expressly give the right of arrest; and it would be a forced and improper construction to say that the case was brought within the provision of section 549 of the Code, which gives to a plaintiff the right to arrest a defendant where the action is for "an injury to property including the wrongful taking and detention or conversion of personal property."

General Term, February, 1882.

Before FREEDMAN, ARNOUX and RUSSELL, JJ.

Tompkins agt. Smith.

APPEAL from an order of the special term vacating an order of arrest.

The action was to recover the sum of \$31,030, alleged to have been lost in gaming.

Upon the complaint and an affidavit reciting the loss and payment of sums amounting in the aggregate to the sum claimed, at the game of faro, an order of arrest was granted, which was afterwards, upon motion, and upon the same papers upon which he had granted it, vacated by the same judge.

L. E. Chittenden, for appellant.

Douglass Campbell, for respondent.

RUSSELL, *J.*—The order of arrest was vacated on the theory that the law does not authorize an arrest in such a case as this. It was claimed on the argument, by the appellant, that the order of arrest ought to have been maintained, because the retention by the defendants of the moneys sued for brought the case within the second subdivision of section 549 of the Code of Civil Procedure, which gives to a plaintiff a right to arrest a defendant where the action is for “an injury to property, including the wrongful taking, detention or conversion of personal property.” The appellant’s contention was that the action sounded in tort; the respondents contended that it sounded only in contract, raised or implied by the statute, which gives the right of action. There can be no doubt that no right of action existed at common law to recover back moneys lost in gaming. The extent to which the courts went was to hold that the law would not enforce such contracts. The action is solely a creature of statute. Our first statute on this subject was the act of 1801 (1 *Rev. Laws of 1813*, p. 153, *chap.* 46), which, following the statute of Anne, gave an action of debt as for money had and received to recover back moneys lost at play. This was followed by the provisions of the Revised Statutes (*sec. 14 of art. 3 of chap. 22 of part 1*),

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which is, "every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting the sum or value of twenty-five dollars or upwards, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost or paid or delivered from the winner thereof."

Were the act of 1801 still in force, it would be quite clear that the appellant's contention could not be sustained, because that act distinctly says the action should be "of debt as for money had and received." But the appellant claims that inasmuch as the Revised Statutes have omitted the words "an action for debt, &c.," that the nature of the action has been changed by statute, or may be changed at the option of the plaintiff, and that while he may still sue as for money had and received, he may also sue in tort and insist that his action should be regarded as for the tortious detention of personal property.

It is of some significance against this contention that it is novel, and that the form of the actions reported in the books since the Revised Statutes were adopted, has remained the same as it was before, at any rate, until the adoption of the Code of Civil Procedure, since which time it has become customary to state the cause of action according to the fact, rather than according to the old forms of pleadings.

An examination of all the authorities cited on the argument and a somewhat extended research on our own part have not enabled us to find a single case in which a plaintiff claimed the right of arrest, and none before the Code of Civil Procedure was adopted, in which the form of the action was other than that of debt for money had and received. From this it would seem to have been the theory of the counsel who drew the pleadings in all these cases that while the words "action of debt, &c.," had been omitted from the Revised Statutes, they had been so omitted rather because they were no longer regarded as necessary than because there was a

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design on the part of the legislature to alter the form of the action or the rights and remedies of the parties under it

All these cases on the part of both counsel and court seem to have proceeded upon the theory that the law created an implied contract on the part of the person receiving money lost at gaming to return the money to the person who had lost it; or that as the money was received without consideration, the statute had removed the bar to the loser's recovery theretofore existing, because the loser was in *pari delictu* (*Meech* agt. *Stoner*, 19 *N. Y.*, 26; *Caussidiere* agt. *Beers*, 2 *Keyes*, 198; *Morgan* agt. *Groff*, 4 *Barb.*, 524; *Like* agt. *Thompson*, 9 *Barb.*, 315; *Fowler* agt. *Van Surdam*, 1 *Denio*, 557; *Standard* agt. *Eytinge*, 5 *Robt.*, 90; *Botts* agt. *Hillman*, 15 *Abb. Pr.*, 184; *Moran* agt. *Morrissey*, 18 *Abb. Pr.*, 131; *Betts* agt. *Bache*, 23 *How. Pr.*, 197; *Collins* agt. *Ragrow*, 15 *Johns.*, 5).

Without the statute the loser would have no remedy whatever, and as the statute gives him whatever rights he has, its construction ought not to be forced or extended beyond its natural effect. More especially is this the case when to so extend it would be in conflict with the whole tendency of our decisions, which insist upon strict construction of laws which imperil or in any way interfere with the liberty of the citizen.

Courts ought not to feel at liberty to legislate into statutory actions rights and remedies not clearly contemplated by the statute itself. Indeed, the Code expressly says (*sec.* 548): "A person shall not be arrested in a civil action or special proceeding except as prescribed by statute."

If we should consider this question so far as it is influenced by analogy to other actions given by statute, we think a most careful examination will fail to find any case where a statute gives a right of action, not otherwise existing, in which the extraordinary remedy of arrest is permitted, unless it is given by clear enactment. Wherever it is the intention of the legislature to give a right to an extraordinary remedy, that

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intention is either clearly expressed in the statute itself or in the Code of Civil Procedure. For instance, in all those cases where a statute imposes a penalty to be sued for in a civil action, it is expressly provided in the Code (*sec. 549, sub. 1*) that an order of arrest may issue

That there is nowhere any express provision of the statute authorizing an order of arrest in an action to recover moneys lost at play, is, we think, almost conclusive of this controversy. That the forms of pleading have been altered by the Code does not affect the question. The weight of authority is in favor of regarding the action as one of contract rather than of tort. But if we regard it, as we may, as sounding neither in contract nor in tort, but simply statutory, then, as the statute does not expressly give the right of arrest to enforce it, we think it would be a forced and improper construction of the section of the Code of Civil Procedure above quoted, to hold that this case comes within its provisions.

We agree with the learned judge at special term that, inasmuch as it was not a matter of favor to the defendant, but of strict right under the law, that the order of arrest should be vacated, the court had not the power to impose as a condition that the defendant should stipulate not to bring an action for malicious prosecution.

The order should be affirmed, with costs.

FREEDMAN and ARNOUX, JJ., concur.

Maguin agt. Rosenthal.

N. Y. COMMON PLEAS.

WM. E. MAGUIN, plaintiff and respondent, agt. SOLOMON D. ROSENTHAL, as a city marshal, defendant and appellant.

Execution — Levy — Agreement to pay keeper's fees, when valid.

Keeper's fees not being a service for which any fee or compensation is fixed or allowed by law, an agreement to pay such fees, if not illegally extorted, is a perfectly valid one in law.

General Term, January, 1882.

Before VAN BRUNT and BEACH, JJ.

APPEAL by defendant from judgment of the third district court for the sum of seventy-three dollars and eighteen cents. Defendant, a city marshal, under an execution against the plaintiff, levied upon plaintiff's property. Plaintiff, to prevent removal, entered into agreement with defendant to allow a keeper to remain in charge, agreeing to pay him three dollars per day. Upon settlement of the execution plaintiff paid defendant the keeper's fees under protest, and then sued for treble the amount so paid, under the statute. The justice of the third district court set the agreement aside as void, and gave judgment for full amount.

Montague L. Marks, for plaintiff and respondent.

Nathan L. Hahn, for defendant and appellant.

PER CURIAM. — The question in regard to the illegality of the agreement for keeper's fees seems to have been disposed of in a previous action; and the objection in respect to the keeper's fees not being provided for by the terms of the statute has also been considered, and in that action it was held

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that because it was not a service for which any fee or compensation was fixed or allowed by law, that for that reason it was not within the terms of the statute prohibiting sheriffs, &c., receiving any fee for services otherwise than authorized by law. It was also held that the statute was created for the purpose of preventing the taking of unlawful advantage or oppression. Where it appeared that the fees charged for such services were demanded by virtue of the office, and resulted in a wrongful use of the office in exacting an agreement of that description, then it would be illegal and then could be recovered back.

It is true there was evidence in this case upon that point; it is equally true that it appears that the justice did not consider that evidence in any respect, but decided entirely upon the illegality of the agreement; and he did not pass at all upon the question as to whether the agreement had been extorted by the use of the authority of the marshal or not, or whether it was an entirely voluntary agreement or an offer to pay for the services. Therefore it would not be just to the defendant that the judgment should be upheld upon any such ground as that.

As to the question of amount, the case is argued upon the theory that one of the exhibits of the defendant bearing the date of the seventh now bears the date of the sixth. That question the court cannot decide, because we do not know whether it had been altered before the return or not. That is a question which must be determined by the court below, whether it has been altered or not.

Under all the circumstances we cannot see that there is any reason why we should reduce the judgment. We think the agreement, unless extorted, was valid, and that the money paid for the services could be received. The judgment being rendered by the justice under a different theory, it must be reversed.

Judgment reversed.

Townsend agt. Simpson

N. Y. COMMON PLEAS.

SAMUEL TOWNSEND agt. SOLOMON L. SIMPSON and others.

Practice — Discharge of a judgment against a bankrupt — Previous applications — Code of Civil Procedure, sec. 1268.

Where, in a suit brought in 1877, upon a judgment obtained in 1858, a motion for leave to set up by supplemental answer an order granted in 1881, under section 1268 of the Code, canceling and discharging the judgment, was denied, upon the ground that it was an attempt to set up defendant's discharge in bankruptcy, application for which had twice been refused, on the ground of laches, and that the denials of the former motions were *res adjudicata* :

Held, that this was error, the last application not being the same as that which had been heard and decided before; and the order canceling the record had so changed the position of the parties to the action that the leave asked should have been granted on terms.

General Term, November, 1881.

APPEAL by defendant Simpson from an order of the special term denying his motion for leave to make and serve a supplemental answer, setting up as a defense to the action an order previously obtained by him canceling the docket of the judgment constituting the cause of action.

The facts are as follows: In 1858, the plaintiff's assignor, Barker, procured judgment in this court against the defendant. In 1877 leave was obtained, and this action was brought upon the judgment and issue joined. In 1878 the defendant Simpson filed his petition in bankruptcy, making the plaintiff and his assignor parties thereto. In 1879 said defendant received his discharge in bankruptcy, and in 1880, eighteen months thereafter, applied to the court for leave to plead the discharge by supplemental answer. Motion was denied on the ground of laches, and thereafter, upon a renewal of the motion upon additional papers, it was again denied.

In 1881, two years having elapsed since the discharge in

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bankruptcy, defendant moved, under section 1268 of the Code of Civil Procedure, to cancel and discharge the Barker judgment obtained in 1858. Said motion was granted. Immediately thereafter the defendant applied for leave to make and serve a supplemental answer setting up the order canceling and discharging the Barker judgment. This motion was opposed on the ground that it was an attempt to set up the discharge in bankruptcy; that it was a renewal of the previous applications without leave first obtained, and that the denials of the former motions were *res adjudicata*.

The motion was denied, and defendant appealed.

Simpson & Werner, for appellant.

Wilson M. Powell, for respondents.

J. F. DALY, J. — The motion for leave to plead the canceling of the judgment is not the same application which had been heard and decided before. The order of July 28, 1881, canceling the record, made a substantial change in the position of the parties to the action. The effect of that order was to remove from the record the judgment upon which this action was brought.

The defendant was entitled upon proper terms to set up the discharge which this court had ordered, pursuant to the imperative direction of the Code.

The court has no power to refuse to carry out the intention of the legislature in that regard. The order should have been made granting the leave asked on payment by defendant of all the costs of the suit, and upon the stipulation to the discontinuance of the action, without costs, if plaintiff desire.

Order reversed, with ten dollars costs and disbursements of appeal.

VAN HOESSEN, J., concurs.

Mathews agt. Tufts.

COURT OF APPEALS.

VIRGINIA B. MATHEWS, respondent, agt. EDWIN TUFTS,
appellant.

*Service of summons or process— Under what circumstances persons exempt
from such service.*

Where a person comes from another state to attend a meeting of creditors at the office of a register in bankruptcy, as a creditor and witness, to prove certain claims, or even as a party or as an attorney for other parties, he is privileged from service of process or summons while so attending.

Decided January, 1882.

Austen G. Fox, for appellants.

Abbott Brothers, for respondents.

RAPALLO, J.—In *Van Liew* agt. *Johnson*, decided March, 1871, and referred to in *Person* agt. *Grier* (66 N. Y., 126), a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the state, while attending a court in this state as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority (*Cole* agt. *Hawkins*, *Andr.*, 275; *S. C.*, 2 *Str.*, 1094; *Arding* agt. *Flower*, 8 *I. R.*, 534; *Miles* agt. *McCullough*, 1 *Binn.*, 77; *Hayes* agt. *Shields*, 2 *Yeates*, 222; *Parker* agt. *Hotchkiss*, 1 *Wall, Jr.*, 269; *Juneau Bank* agt. *McShedan*, 5 *Biss.*, 64; *Halsey* agt. *Stewart*, 1 *South. [N. J.]*, 366; *Miller* agt. *Dungan*, 8 *Va.*, 182; *In re Healy*, 53 *Vt.*, 694).

This exemption from service of civil process has been frequently accorded to creditors attending proceedings in

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bankruptcy (*Ex parte List*, 2 Ves. & B., 373; *Ex parte King*, 7 Ves. Jr., 312), and to a creditor who attended before the commissioners to propose himself as assignee and watch the proceedings (*Selby agt. Hills*, 8 Bing., 166). Commissioners in bankruptcy are a court of justice sufficient for the purpose of having their witnesses protected by the court of chancery, at least, if not by themselves. They sit in the nature of a court in the administration of justice (*Arding agt. Flower*, 8 I. R., 534).

In proceedings in bankruptcy the due administration of justice requires that all the creditors should be free to attend, without interference by service of process of any kind. The moving affidavit showed that the defendant came from Boston, where he resides, to New York, and attended the meeting of creditors, at the office of the register in bankruptcy, solely as a creditor and witness to prove certain debts and claims against the estate of the bankrupt, and to participate in the choice of an assignee, and for no other purpose; that while so attending, and while the meeting was being held, or immediately thereafter, before he had time to complete his business as such creditor and witness at such meeting and leave the office, the summons was served upon him. It appears that the defendant did, at said meeting, present proofs of claims amounting to upwards of \$386,000 in his own behalf, and also presented proofs of claims of other creditors, as their attorney in fact, and voted for the assignee, both individually and as attorney for the other creditors whom he represented, and that the proofs of debt had been prepared and verified in Massachusetts. The plaintiff claims that the defendant was not attending as a witness, but only as a creditor; and, also, on the hearing of the motion, read affidavits denying the validity of his claims as a creditor. These claims could not be tried on the motion to set aside the service, and conceding that the defendant was in attendance only as a party, and as attorney for other parties, we think that he was privileged from service of process or summons while so attending.

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The order of the general term should be reversed, and that of the special term affirmed, with costs.

All concur.

SUPREME COURT.

HENRY G. FISK and others, respondents, agt. LUCIUS L. SPRING,
appellant.

Attachment — Perishable goods to be sold — Code of Civil Procedure, section 656 — Goods which do not come within the definition of the word "perishable" as used in this section.

Where goods consisting of underwear, neckties, shirts, jewelry, gloves, umbrellas, &c., were levied upon under an attachment and sold at auction, under direction of the court, as "perishable:"

Held, that the fact that goods will depreciate in value because of changes in their styles and fashions, is not of itself sufficient under section 656 of the Code of Civil Procedure to render the property perishable, it being the fashion, not the article that is perishable.

Kid gloves, which are liable to have their value destroyed by spots, come within the definition of perishable, but woolen goods, though liable to be moth eaten, do not, as they can be protected from such liability.

BRADY, J. (dissenting). *Held*, that where goods would suffer in value by being kept, if they did not perish absolutely, by reason of the change of fashion or by injuries from moths, they are to be regarded as perishable.

First Department, General Term, November, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from order of Mr. justice DONOHUE, authorizing the sale of property as perishable.

Charles E. Sole, for appellant.

B. F. Watson, for respondent.

DANIELS, J.—As to a very large, if not the greater portion of the goods, they will only suffer by being retained until they

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can be sold under an execution, if a judgment shall be recovered, by reason of the circumstance that they will depreciate in value, because of changes in their styles and fashions. That is not of itself sufficient to render the property perishable, as that term has been employed in section 656 of the Code of Civil Procedure. To render property perishable it is essential that it shall appear to be inherently liable to deterioration and decay. Many articles are of that description, and become useless and valueless by the mere effects of time. They cannot be preserved, and for that reason must be used and disposed of within an early period of time to be available for use at all. If mere changes in fashions and styles would justify an order for a sale under this provision of the Code, then in all cases of the attachment of goods and merchandise, sales could be ordered whenever a seizure might be made of them. That would render process of this nature extremely oppressive and in many cases utterly destructive of the rights and interests of the defendant, and this provision of the Code could not have been intended to permit it. As to the kid gloves, the order seems to have been proper, and perhaps it might have been made so as to the woolen goods to be moth eaten, but as they can be probably protected against that liability by occasional attention, that should be given to them, and in that way rendering an immediate sale entirely needless. All the goods can be preserved as they are by reasonable attention and care, and that the sheriff is bound to bestow upon them, until the right to make a sale of them shall be secured by a judgment against the debtor, and an execution be issued for that purpose. The order should be modified so as to allow a sale of the kid gloves, as they are shown to be inherently liable to decay and deterioration, and as so modified affirmed, without costs.

DAVIS, *P. J.* — I agree with the views of my brother DANIELS in this case. The fickleness of fashion does not, of itself render articles "perishable" within the meaning of

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the Code. When the only damage or deterioration in value arises from a probable change of fashion, it is the fashion that is perishable not the article; the latter retains all its intrinsic value unchanged in form and substance, ready for the recurring wave of fashion which may restore or even enhance its market value. Under the rule laid down by the court below and adopted by my brother BRADY, there is no article of merchandise that is not "perishable" by the whim or caprice of the hour, or non-perishable as they may rise or fall. The property of defendants when attached would be subject to ruinous sacrifices for which no remedy is provided, if that construction shall prevail. I think the order should be modified as suggested in the opinion of DANIELS, J.

BRADY, J. — It appears that an attachment was issued in this case, by virtue of which certain property in possession of the defendant was levied upon. It would seem from the evidence that he kept a stock known as gentlemen's furnishing goods, consisting of underwear, neckties, shirts, jewelry, gloves, umbrellas, &c. The plaintiffs, regarding this property as perishable, made application for leave to sell it as such, under section 656 of the Code, which provides that "if property attached, other than a vessel, is perishable, the court may, by order made with or without notice, as the urgency of the case in its or his opinion requires, direct the sheriff to sell it at a public auction; and thereupon the sheriff must sell it accordingly." The application was granted, and the defendant appeals upon the ground that the property was not perishable within the meaning of the statute. The word "perishable" in the Code is to be interpreted according to its ordinary signification; in other words, it is to have the effect embraced within its definition by the lexicographer. Webster defines it as follows: "Liable to perish; subject to decay or destruction." And "decay" is defined to be "a gradual failure of health, strength, soundness, prosperity; and species of excellence or perfection declined to a worse or less

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perfect state." The question presented to the court below was whether, on the evidence, with this definition of the word "perishable" in view, the property levied upon could be sold under the provisions of the Code mentioned. The evidence shows that the attachment was issued on the 19th of January, 1881, and that a portion of the goods levied upon could only be used in summer; that the dealers therein buy them in February and March; that after the first of February very few winter goods were sold until the following fall. It appears that another portion of the goods were made of wool, and if they were boxed up and put in a warehouse for a year, there would be great danger of their being eaten by moths; that though it might be prudent, if they were kept, to have the goods opened and shaken every few weeks, the operation would entail considerable expense. It appears, also, that another portion was silk and lisle thread goods intended for summer wear, and that, if sold to dealers, it was necessary that the sale should be made in February or March. It also appeared that another portion was kid gloves, which, if stored, would be likely to become mildewed and spotted, and to lose value by reason of the change in fashion. It also appeared that another portion was neckties and scarfs, and that they are goods which depend for their value almost entirely upon fashion, which changes with every season, creating, therefore, the necessity that they should be sold at once and before the fashion changed. Upon these various points the evidence, though in conflict, preponderates in favor of the proposition that the goods would suffer in value by being kept, if they did not perish absolutely, by reason of the change of fashion or by injuries from moths, or, in the case of the kid gloves, by spots which would destroy their value almost entirely. The learned justice who heard the motion, having been justified in arriving at the conclusion that the detention of the goods by the sheriff would result in their depreciation in value, made the proper order in reference to their disposition. It may be said that they were perishable, because they were

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liable to decay or destruction; and if liable to decay, they were liable to decline to a worse or less perfect state than when the application was made to sell them. The word "perishable," used in relation to a stock of goods such as described, should be held applicable particularly for the reason that the value of the goods may be affected by the changes of fashion, which, according to the evidence of the experts in the case, is liable to occur. If there were no other reason, this would seem to be sufficient to justify a sale, not only for the protection of the plaintiffs, but for the security of the defendant. There can be no doubt about the proposition as to the changing fashions on the evidence in this case. It may, indeed, be said to be a subject of which the court would take notice, that the changes of fashion in articles of wearing apparel considerably affect their value. If, superadded to that, there be any danger of decay by spotting, or by the ravages of insects upon the article, it would seem to be the duty of the court, for the protection of all parties, to order the sale to be made at a time which would seem to be most advantageous to obtain the best prices. The result of this investigation, therefore, although no case can be found decisive of the precise point involved, and none was cited, is that the articles levied upon, within the purview of section 656 of the Code, were perishable, not so much from the inherent causes of decay as from the external circumstances and contingencies affecting their value as articles of merchandise. For these reasons, I think the order appealed from should be affirmed, with ten dollars costs and the disbursements of the appeal.

Baere agt. Armstrong *et al.*

SUPREME COURT.

JAMES BAERE, respondent, agt. GEORGE E. ARMSTRONG *et al.*,
appellant.

*Attachment — Damages recoverable upon vacating — Undertaking — Code of
Civil Procedure, sections 640, 688.*

Where an attachment against property is vacated, the taxable costs and all reasonable counsel fees, on a motion necessary to get rid of the attachment, may be recovered upon the undertaking filed upon obtaining the attachment.

If the attaching creditor pays such taxable costs the amount so paid reduces, *pro tanto*, the liability assumed by the undertaking, and must be allowed in the action brought thereon.

Where the motion at special term to vacate the attachment was granted, should the sureties in such an undertaking be held liable for the costs and expenses made by their principal, by appeal, to reinstate his attachment, *quere?*

First Department, General Term, December, 1881.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

M. H. Regensberger, for appellants.

Blumensteil & Hirsch, for respondents.

DAVIS, P. J.—On the 30th of December, 1878, II. B. Claflin and others applied, under the provisions of the Code of Civil Procedure, for an attachment against the property of Julius Baere and Louis Baere, the above named respondents, and the above named appellants, as sureties, under the provisions of section 640 of the Code of Civil Procedure, executed an undertaking whereby they jointly and severally undertook, in the sum of \$250, that if the defendants in that action recovered judgment, or if the warrant of attachment was vacated, the plaintiffs therein would pay all costs which might be awarded to the defendants, and all damages which they

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might sustain by reason of the attachment, not exceeding the sum mentioned. The attachment was issued and served, and in January following it was discharged upon the execution of the bond required by section 688 of the Code.

Afterwards and in April following, upon motion made by the defendants at special term, the attachment was set aside, vacated and discharged, with ten dollars costs. From the order so vacating the attachment Claflin and others, the plaintiffs therein, appealed to the general term of the supreme court, where the order was affirmed, with costs. They then appealed to the court of appeals from the order of the general term, which order was there affirmed, with costs. An action was then brought upon the undertaking against the present appellants, by the respondents, to recover as damages alleged to have been sustained by reason of the attachment, the expenses for counsel fees upon the motion at special term to vacate the attachment, and for attorney and counselor's fees upon the appeals to the general term and the court of appeals. On the trial proof was given, under the objection and exception, of the expenses of counsel fees paid by the respondents for the argument of the motions at special term and on the several appeals, to a sum exceeding \$250, the amount named in the undertaking, and a verdict was rendered in their favor for that amount. The appellants, in the course of the trial, offered, in substance, to prove that Claflin & Co. had paid the costs of appeal to the court of appeals, amounting, in the whole, to about \$110. Evidence to show these payments was rejected by the court and an exception duly taken.

There seems to be no doubt, under the authorities, that the reasonable expenses for counsel fees, on a motion necessary to get rid of the attachment, may be recovered upon such an undertaking (*Northrup* agt. *Garbett*, 17 *Hun*, 497; *Ball* agt. *Gardner*, 21 *Wend.*, 270; *Bennett* agt. *Brown*, 20 *N. Y.*, 99). These cases establish that where the defendant in an attachment suit is obliged to bring an appeal, or several appeals, to the higher courts, to get the attachment vacated,

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the expenses attending such appeal are covered by the language of the undertaking. But in this case the motion at special term to vacate the attachment was not denied. It was granted, and the attachment wholly ceased to exist upon entering the order vacating the same. It was Claffin & Co. who brought the appeals to the general term and the court of appeals, and the expenses recovered in this suit were not incurred in an effort to get rid of the attachment, but in resisting an attempt on the part of Claffin & Co. to have the order which vacated it reversed. No case has been called to our attention where the sureties in such an undertaking have been held liable for the costs and expenses made by their principal, by appeal, to reinstate his attachment. Whether the liability of the sureties goes to such an extent, need not now be determined. For we are of opinion that it was error to exclude the offer to show that Claffin & Co. had paid the costs awarded upon the motion and the several appeals.

The undertaking of the sureties was that their principal would pay all costs which might be awarded to the defendants, and all damages which they might sustain by reason of the attachment not exceeding the sum of \$250. If the evidence had been received it would have shown that Claffin & Co. had paid a portion of the liability which the sureties had undertaken they would pay. Undoubtedly if the respondents in this action are right in their position that the undertaking followed the appeals to the several courts, the costs awarded by those courts were a part of the liability which the sureties in the undertaking agreed that their principal should pay. Their undertaking was that their principal will pay such costs and damages to the amount of \$250; and when their principals do make payment to the amount thereof their liability on that undertaking is at once discharged. The respondents could not proceed to collect of Claffin & Co. a portion of their costs or damages and then proceed upon the undertaking against the appellants for the whole amount therein specified. Such a construction would impose upon the sureties a greater

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liability than they have undertaken; and while the rule is that they should be held like other contracting parties strictly to the liabilities incurred, the doctrine that their agreement is to be construed *strictissimi juris* forbids any extension of liability by construction. The question has been distinctly passed upon by McADAM, J., in a case in the marine court, in which he held, we think, correctly to the effect that any sum paid by the plaintiff in the attachment suit for costs and damages awarded against him operated to reduce the liability specified in the undertaking given by the sureties. We think that decision correct, for the liability of the sureties is not to pay any balance for which his principal may be responsible and which cannot be collected of him, but that his principal will pay all such liability not exceeding a specified sum. In this case, unfortunately, the judge who granted the attachment only required that sum to be \$250, although the attachment was for an indebtedness of \$6,000. The sum was altogether too small, but, nevertheless, it fixed the liability of the sureties and cannot be extended at this stage of the case. For the error in excluding this evidence there must be a new trial.

The judgment must be reversed and a new trial ordered, with costs to abide event.

BRADY and DANIELS, JJ., concurred.

D I G E S T

CONTAINING THE WHOLE OF

62 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 25 HUN, AND 83 AND 84 N. Y. REPORTS.

Attention is called to the three additional headings "CODE OF PROCEDURE," "CODE OF CIVIL PROCEDURE" and "CODE OF CRIMINAL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ACCOUNTING.

See TRUSTS.

Magauran agt. Tiffany, ante, 251.

ACTION.

1. Where the allegations of the complaint showed that plaintiffs have a lien by attachment on a certain stock of goods of defendant, Samuel Plonsky, which lien was acquired December 24, 1881, and still is in force. That on December 13, 1881, Samuel Plonsky made a general assignment to Eli M. Cohen, who claims the said attached property and has notified the sheriff of such claim; that in said assignment the defendants Anna, Ezekiel and Moses Plonsky are preferred creditors; that the assignment is fraudulent and void, and part of a fraudulent conspiracy between the defendants, and that the preferred claims are wholly or in part fictitious; that on December 23, 1881, notwithstanding those preferences, the defendant, Samuel Plonsky, confessed judgments to each of the defendants Anna, Ezekiel and Moses Plonsky upon the same debts for which they are preferred in the assignment. Executions were on that day issued to the sheriff, who took possession of

the same property attached by the sheriff upon the warrants of plaintiffs. That these executions are prior liens to those of the plaintiff, and sheriff recognizes them as such. It is charged, and the proofs show, that these judgments and executions form and are a part of the conspiracy to defraud the creditors of Samuel Plonsky. The prayer of the complaint is substantially that the obstructions created by the fraudulent execution and assignment be removed. The action is brought by plaintiffs against Samuel Plonsky, Eli M. Cohen, Anna Plonsky, Ezekiel Plonsky and Moses Plonsky, and a motion is made for an injunction to restrain the defendants from receiving and the sheriff from paying these amounts of the executions:

Held, first, that the right of action can be sustained upon the principle that the attaching creditors have a specific lien which entitles them to remove fraudulent obstructions to the due execution of the process.

Second. That the complaint is not multifarious for the reason that a conspiracy between all the defendants is charged, and the various devices which have been resorted to are but the details of a single scheme and a common purpose.

Third. That a *prima facie* case

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for an injunction both upon the law and the facts has been made out. (*Bates et al. agt. Plonsky et al.*, ante, 429.)

2. The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto*. (*Sparman agt. Keim*, 83 N. Y., 245.)
3. Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered. (*Lockwood agt. Quackenbush*, 83 N. Y., 607.)

ADMISSIONS AND DECLARATIONS.

1. The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will. (*Williams agt. Freeman*, 83 N. Y., 561.)

AFFIDAVIT.

See ATTACHMENT.

Rupert agt. Haug, ante, 364.

AGENTS.

1. When an agent, under a contract regulating his services and compensation as a canvasser of books in process of publication, writes to his principal as follows: "I have determined to sell out and give up this business; if you want it, come or send on, and I will give you the figures which I will take; this is final."

Held, that the principal was justified, after making a fair and reasonable proposition to settle, which was not accepted, and the good faith of the agent was reason-

ably suspected, under the facts and circumstances of the case, as stated in the opinion, in treating the defendant's action as an abandonment of the agency, and in at once appointing another person in his place, and that a sale of the list of subscribers, or an attempt to release them, made by Key thereafter, was invalid. (*Standard agt. Key*, ante, 137.)

ALBANY MEDICAL COLLEGE

1. "The Albany Medical College" was created a corporation by and organized under chapter 26 of the Laws of 1839. The board of trustees is composed of twenty-five persons, and by section 4 of the act such trustees are authorized "to appoint the professors and such other instructors as they may deem necessary, subject to a removal by a vote of two-thirds of the members constituting said board, when found expedient and necessary." The relator was, on February 8, 1876, duly appointed a professor, which position he accepted and continued to discharge its duties until January, 1880. On January 2, 1880, a meeting of the trustees was held at which the professorship which the relator held was abolished by a vote of fifteen to four, nineteen members only being present. The only notice of the meeting was by postal card addressed to each of the trustees. By the statutes of this state (*vol. 1 of Edm. ed.*, page 406; *vol. 2 of 6th ed.*, page 12) it is provided: "The trustees of every college to which a charter shall be granted by the state shall be a corporation." Provision is then made for the meetings of trustees, and it is enacted: "Notice of the time and place of every such meeting shall be given in a newspaper printed in the county where such college is situate, at least six days before the meeting; and every trustee resident in such county

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shall be previously notified, in writing, of the time and place of such meeting." On *mandamus* to compel the college to reinstate the relator:

Held, first. That the provisions of the statute above quoted do not refer exclusively to "literary colleges," but are applicable to every college, and consequently the meeting of the trustees, at which the relator's professorship in the medical college was abolished, was illegal, because notice of such meeting was not published as required by statute.

Second. That though the act attempted to be done is called the abolition of the professorial chair, its effect being to remove the relator from office, the provision of the charter requiring a two-third vote was applicable.

Third. That the acceptance of the relator's services for four years as a professor cured the irregularity of the original appointment, if any there was.

Fourth. That *mandamus* is the proper remedy. (*The People ex. rel. Swinburne* agt. *Albany Medical College*, ante, 220.)

ALLOWANCE.

1. Where an attorney was employed by an individual to bring a suit or conduct proceedings against an insolvent insurance company, whose assets had been placed in the hands of a receiver, such proceedings having for their purpose and effect the protection of the general fund and assets of the company, and their concentration in such shape and under such control as should be for the benefit of all policyholders and others concerned in the same:

Held, that the court has power to order the services paid for out of the funds in the hands of the receiver. (*Attorney-General* agt. *Continental Life Ins. Co.*, ante, 130.)

2. The protection of trusts requires

representative proceedings, and when necessary and proper should be encouraged, and the court as the administrator of the trust has the power to compensate those who aid it in the discharge of their duty. (*Id.*)

3. In cases concededly difficult and extraordinary, section 3253 of the Code of Civil Procedure will authorize an extra allowance to the plaintiff not only upon the sum recovered in the action, but upon the basis of the defendant's counter-claim determined against him. (*Woonsocket Rubber Company* agt. *Rubber Clothing Company*, ante, 180.)

AMENDMENT.

1. A defendant who has demurred, but has not allowed his time to amend of course to pass, has a right to withdraw his demurrer and serve an answer instead, without leave of the court. (*The People* agt. *Whitwell*, ante, 383.)
2. In such case the answer must be regarded as an amendment of the demurrer. (*Id.*)
3. The plaintiff, who had been appointed a receiver in supplementary proceedings instituted against a firm, brought this action against the defendant to set aside as fraudulent a general assignment made by the said firm to him, and recovered a judgment therein setting aside the assignment, adjudging that the defendant had received \$2,500, and requiring him to pay, out of the assets so received, to the plaintiff the sum of \$2,196.17, with interest and costs. Thereafter the defendant presented to the judge before whom the action was tried an affidavit showing that he had received but \$2,631.37; that before the commencement of this action he had paid out \$430.77, and that in an action of replevin brought against him by one Rockwell,

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which was tried and decided at the same time and by the same judge who tried and decided this action, a judgment for \$334.05 had been recovered against him, and moved thereon, and obtained an order to the effect that he, the defendant, be charged with \$2,631.37 and interest, to wit, \$2,786.37, and credited with the amounts set forth in the affidavit, to wit, \$766.27, and ordering that the roll be taken from the files and the decision and judgment be amended so as to declare that the assets in the defendant's hands, applicable to the payment of the plaintiff's demand, were \$2,020.10:

Held, that the order was improperly made and should be reversed; that the plaintiff's remedy, if any, was by an appeal or by a motion for a new trial. (*Rockwell* agt. *Carpenter*, 25 *Hun*, 529.)

4. This action was brought against the defendant Remington's Agricultural Works, a corporation duly formed under the laws of this State, to recover for the breach of a contract alleged to have been made by it. The summons and complaint were served by delivering the same to Philo Remington, as one of the defendant's officers. In fact the contract was not made by the defendant, but was made, if at all, by a partnership consisting of Philo Remington, Samuel Remington and Eliphalet Remington, which had bought out the business of the defendant and was carrying on business under the name of the Remington Agricultural Company. Upon learning these facts the plaintiff, after issue had been joined, applied for leave to amend the summons and complaint by striking out the defendant's name and substituting therefor the names of the three partners:

Held, that under section 723 of the Code of Civil Procedure the court had power in its discretion to grant the amendment. (*N. Y.*

Milk Pan Co. agt. *Remington's Works*, 25 *Hun*, 476.)

5. In an action upon a contract the general term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial (*Code of Civil Procedure*, § 723). (*Harris* agt. *Tumbridge*, 83 *N. Y.*, 92.)

ANSWER.

1. An answer in a partition suit which alleges that the defendant, one of the tenants in common, owns the lot adjoining one of the lots sought to be partitioned; that their father, from whom estate comes in his lifetime, caused to be erected a two story and basement building with stone foundation, partly on defendant's own lot and one of the lots involved in such suit, without authority so far as defendants' lot was concerned, and asking to be awarded full possession of his lot and for \$500 damages is a nullity, and the usual order of reference as upon default is proper. (*Nolan* agt. *Skelly*, *ante*, 102.)
2. An order of the county court granting a motion to amend an answer under section 723 of the Code of Civil Procedure, affects "a substantial right," and is appealable (*See Bowen* agt. *Widner*, 12 *W. Dig.*, 525). (*New* agt. *Aland*, *ante*, 185.)
3. Upon such an appeal the merits will be considered. (*Id.*)
4. Where an order permitted a defendant to serve "an amended answer, setting up such defenses as he shall be advised," &c.:
Held, erroneous; that the defendant must be confined to his proposed amended answer. (*Id.*)
5. Where plaintiff, as a *cestui que*

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trust under a will, brings suit against the two trustees appointed thereunder for an accounting and for the removal of one of them, alleging that defendants were directed by the will to invest \$40,000 and pay her the income for life, and that they paid her for several years various sums, represented to be such income, but that they had, since April, 1879, refused to make such payment:

Held, that as defendant's denial in his answer, that he ever received the \$40,000 referred to, from the estate, raises an issue as to plaintiff's right to demand an accounting, and his removal as trustee, the detailed statements of facts by which such conclusion is reached, though set up as separate defenses, are not good grounds of demurrer. If found expletive or redundant, they should be expunged by motion. And as plaintiff, by her demurrer to such statements of fact, admits that she and her mother received \$10,000 under a mistaken interpretation of said will, for her fair share or proportion of which she is liable to the defendant, and that for the purpose of securing payment of such liability, she and her mother assigned to defendant their share in the estate, by virtue of which defendant counter-claims the moneys advanced by him, such counter-claim being allowable under section 501 of the Code, and the trust fund in dispute being personal property, the provisions of the Revised Statutes in relation to uses and trusts do not apply; and such fund being therefore answerable under certain conditions of fact, to the claims of a creditor, though the counter-claim, as pleaded, may not, if proved, entitle the defendant to a judgment on the trial, yet the demurrer should be overruled, as such counter-claim may tend to diminish or defeat the plaintiff's recovery. (*Perry* agt. *Foster*, ante, 228.)

6. In an action by attorney for pro-

fessional services, the answer set up settlement and payment, also waiver of lien of the attorney for costs. On a motion to strike out on the ground of immateriality and redundancy and for judgment:

Held, that these matters are neither immaterial or redundant. (*Lansing* agt. *Ensign*, ante, 363.)

7. Matters accruing after suit commenced and before answer is put in, may be set up in the answer. (*Id.*)

8. The attorney, under section 66 of the Code of Civil Procedure, has an absolute lien for his compensation. (*Id.*)

APPEAL.

1. The plaintiffs, having obtained from one justice an order granting an examination of the defendants before trial, an appeal from an order by another justice denying a motion to vacate the first order is held not well taken, because the first order was conclusive until reversed or leave given to renew the application to vacate; and the fact that the order to show cause why the order for an examination should not be set aside, upon the return to which the order appealed from was made, was granted by the same justice who made the order for such examination, does not of itself amount to leave to renew. (*Amsinck* agt. *North*, ante, 114.)

2. An order of the county court granting a motion to amend an answer under section 723 of the Code of Civil Procedure, affects "a substantial right," and is appealable (*See Bowen* agt. *Widner*, 12 *W. Dig.*, 525). (*New* agt. *Aland*, ante, 185.)

3. Upon such an appeal the merits will be considered. (*Id.*)

4. On an appeal from a district court judgment to the court of common

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pleas no undertaking or deposit is required to perfect the appeal. The payment of the costs of the action only is required by section 3047 of the Code of Civil Procedure. (*Struve* agt. *Droge*, ante, 258.)

5. By section 3050 no undertaking is required unless a stay of execution is desired. (*Id.*)

6. Where a notice of appeal from the judgment of a justices' court was dated June 17, 1881, was signed "C. E. Howe, appellant's attorney," and was served with an undertaking in due form to stay execution, signed and acknowledged by the appellant in person:

Held, that was sufficient. (*Bishop* agt. *Van Vechten*, ante, 261.)

7. The notice of appeal is a mandate of the county court, is properly entitled therein, and governed by the same general principles as other proceedings in a court of record. A party may sign it as attorney in person, adding office address or place of business, residence or other place where papers may be served upon him as required by Rule 2, general rules of practice, or by an *attorney-at-law*, and cannot be signed by an *attorney in fact* or an agent as such. (*Id.*)

8. Where, in an action against the sheriff for damages for neglecting to return an execution within sixty days, the court, upon the trial, gave an interlocutory judgment in favor of the plaintiff on the pleadings, and sent the cause to another branch of the court that the plaintiff's damages might be assessed:

Held (reversing judgment for plaintiff), 1. That the interlocutory judgment is reviewable upon this appeal, notwithstanding the defendant, in his notice of appeal, did not mention the interlocutory order, because the Code which was then in force did not require

any such specification to review interlocutory judgments or intermediate orders. (*Ansonia Brass Company* agt. *Connor*, ante, 272.)

See INJUNCTION.

Gardner agt. *Gardner*, ante, 265.

See NOTICE OF JUDGMENT.

Devlin agt. *The Mayor*, ante, 168.

9. *Semble*, that an appeal does not lie to the general term from an interlocutory judgment, to the effect that the plaintiffs have judgment unless the defendants who have interposed a demurrer answer over within twenty days, etc. (*Trust and Deposit Co.* agt. *Pratt*, 25 *Hun*, 23.)

10. A proceeding instituted in a justice's court by a city, to recover the penalty imposed for a violation of a city ordinance, is a civil action, and under section 351 of the old Code the judgment of the justice can only be reviewed by appeal. (*See City of Buffalo* agt. *Schliefer*, 25 *Hun*, 273.)

11. A judgment of a county court affirming a final order or judgment of a justice of the peace in summary proceedings is appealable to the general term — Code of Civil Procedure, sec. 2260 — when an appeal lies under section 1340 of the said Code. (*See Warner* agt. *Henderson*, 25 *Hun*, 303.)

12. An order of county court granting leave to issue an execution upon a justice's judgment, of which a transcript was filed in the Albany county clerk's office, is not appealable. (*See Kincaid* agt. *Richardson*, 25 *Hun*, 237.)

13. When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit. (*Painton* agt. *No. Cent. R. Co.*, 83 *N. Y.*, 7.)

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14. In an action upon a contract the general term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial (*Code of Civil Procedure*, sec. 723). (*Harris* agt. *Trumbridge*, 83 *N. Y.*, 92.)
15. When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. (*Veeder* agt. *Baker*, 83 *N. Y.*, 163.)
16. *It seems* that the motion should be made in the supreme court. (*Id.*)
17. Notwithstanding the provision of the Code of Civil Procedure (sec. 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 30; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc. (*Taylor* agt. *Wing*, 83 *N. Y.*, 527.)
18. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. (*Briggs* agt. *Waldron*, 83 *N. Y.*, 582.)
19. The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here, although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery. (*Loeb* agt. *Hellman*, 83 *N. Y.*, 601.)
20. Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered. (*Lockwood* agt. *Quackenbush*, 83 *N. Y.*, 607.)
21. For the purposes of a motion to dismiss, an appeal is to be regarded as pending where notice of appeal was duly served and undertaking given, and the appellant has not abandoned the appeal. (*Stevens* agt. *Glover*, 83 *N. Y.*, 611.)
22. An order of general term refusing to open a default is not appealable. (*Id.*)
23. So, also, a judgment of affirmance by default of the general term is not reviewable here. (*Id.*)
24. Where order in supplementary proceedings made in district where venue was laid and roll filed appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides, such justice has power to change referees and the exercise of this power is discretionary and not reviewable here. (*See Pardee* agt. *Tilton*, [Mem.], 83 *N. Y.*, 623.)
25. This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy

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between them, in fraud of the rights of the lunatic:

Held, that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character, and that an order of reference was not reviewable here. (*Harrington* agt. *Bruce*, 84 N. Y., 103.)

26. Judgment was rendered in this action upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general, on appeal to this court, gave the required stipulation for judgment absolute:

Held, that this was not an assent to an affirmative judgment on a counter-claim set up in the answer; that it waived no legal objection to the counter-claim or immunity of the state from such a judgment. (*People* agt. *Dennison*, 84 N. Y. 272.)

27. Upon the trial of an action there was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached:

Held, that there was no exception bringing the error, if any, to the notice of this court. (*Develin* agt. *Cooper*, 84 N. Y., 410.)

28. Where plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal. (*Southwick* agt. *First Nat. Bk.*, 84 N. Y., 420.)

29. Where a summons was served upon a sheriff by delivery to his deputy at his office, *held*, that an

omission to prove the filing of notice on the trial, if required, was cured by the bringing of the notice to the general term, on appeal from judgment against the sheriff. (*Dunford* agt. *Weaver*, 84 N. Y., 445.)

30. An omission in proof of a matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed. (*Id.*)

31. *It seems*, that assuming the court has power in a foreclosure suit to compel the owner of the equity of redemption to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. (*Rider* agt. *Bagley*, 84 N. Y., 461.)

32. So, also, where fraud or contempt upon the supreme court is charged upon the owner in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. (*Id.*)

33. Where, upon motion to vacate an order for examination in supplementary proceedings for the collection of a tax, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the question was not reviewable here. (*Code of Civil Procedure*, sec 1337) (*Bassett* agt. *Wheeler*, 84 N. Y., 466.)

34. Where an order is made by this court on appeal from a judgment reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. (*First Nat. Bk. of M.* agt. *Fourth Nat. Bk.*, 84 N. Y., 469.)

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35. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed an exception should be taken. (*Muldoon* agt. *Blackwell*, 84 N. Y., 646.)

36. The allowance of costs in the supreme court in an equity action and whether to one or more respondents, is in the discretion of the court below, and its decision is not reviewable here. (*Van Gelder* agt. *Van Gelder*, 84 N. Y., 658.)

37. The probate of a codicil to a will was contested, both on the ground of want of due execution and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The general term, upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate:

Held, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence. (*Dack* agt. *Dack*, 84 N. Y., 663.)

38. *It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the general term, it is not correct practice for respondent's attorney to return the case, and upon failure to serve others, to enter order dismissing appeal. (*Bliss* agt. *Hoggson*, 84 N. Y., 667.)

39. *It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and in default of such cor-

rection, that appeal be dismissed. (*Id.*)

40. The supreme court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here. (*Wilson* agt. *Simpson*, 84 N. Y., 674.)

APPEARANCE.

1. The objection that a county court has not jurisdiction over the person of the defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits. (*Potter* agt. *Neal*, ante, 158.)

2. A guardian *ad litem* can only be regularly appointed for an infant defendant under the age of fourteen after service of summons personally or by the substituted mode of service prescribed. (*Ingersoll* agt. *Mangam*, 84 N. Y., 622.)

3. An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the Code (*sec.* 424) which provides that such an appearance shall be equivalent to personal service of the summons. (*Id.*)

ARBITRATION.

1. In March, 1880, these three actions were pending in this court, having been referred to a referee to hear and determine. There were also several suits pending in the circuit court of Christian county, Missouri. The parties entered into an agreement to submit all their matters in difference to two arbitrators for settlement,

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"said arbitrators finding an award to be final, and conclusive on the parties hereto." The submission also contained a clause, that "all suits now pending" are hereby suspended until the award of said arbitrators is made, when the same shall be dismissed:

Held, that this language indicates an intention upon the part of both parties that the submission should not operate as an absolute discontinuance of the several actions. (*Ensign agt. St Louis and San Francisco Railway Co., ante*, 123.)

2. The suits were simply suspended during the time required to execute the arbitration, and when the award was made then the actions were to be dismissed. They could not regularly be moved by either party during the lifetime of the submission. (*Id.*)

3. Where it was said by plaintiff that the submission was procured by fraud; that the arbitrators were stockholders of the defendant and therefore not proper persons to act as arbitrators, and that the submission had been revoked:

Held, that if these allegations were true the orderly course for the plaintiff to pursue would be to make a motion or bring a suit to set aside the submission. (*Id.*)

ARREST.

1. In an action brought under the provisions of the Revised Statutes to recover moneys alleged to have been lost in gaming, the defendant is not subject to arrest, as the statute does not expressly give the right of arrest; and it would be a forced and improper construction to say that the case was brought within the provision of section 549 of the Code, which gives to a plaintiff the right to arrest a defendant where the action is for "an injury to property including the wrongful taking and detention

or conversion of personal property." (*Tompkins agt. Smith, ante*, 499.)

See EXECUTION.

Whitman agt. James, ante, 132.

See STIPULATION.

Schuyler agt. Englert et al., ante, 479.

2. *It seems* public policy requires that officers armed with bailable process for the arrest of defendants should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements. (*Toles agt. Adee, 84 N. Y.*, 222.)
3. *It seems*, also, the fact that, under our practice, bail taken by a sheriff on discharging a defendant from arrest stands in some sense both as bail to the sheriff and bail to the action, does not affect the application of the statute making void obligations taken *colore officii* in any other case or manner than as provided by law (2 R. S., 286, sec. 59) when the undertaking contains conditions not prescribed by law; nor is it in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality. (*Id.*)
4. *It seems*, also, the validity of the security is not dependent upon the question whether it was voluntarily given or was extorted by actual duress and oppression. (*Id.*)
5. Where, however, the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (sec. 183) the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail, as prescribed by said Code (sec. 187), did agree, at defendant's solicitation, to take to plaintiff's attorney an undertaking executed by one in double the amount specified in

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the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that if they should decline to accept, he would, on being notified, give a new undertaking, as prescribed by the Code, and in the meanwhile should remain in the custody of his bail; and where said attorneys accepted the undertaking so executed, *held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority, and that so considered it became operative and binding, though not as a statutory obligation. (*Id.*)

ASSIGNMENTS.

1. Where the property of a copartnership is assigned under the general assignment act, by one member of the firm, and he also assigns in the same instrument his individual property not exempt under attachment:

Held, "The statute of exemption does not expressly exempt a trademark," and therefore the clause in the assignment is not available to prevent the examination of such assignor under section 21 of the general assignment act of 1877. (*Matter of Swozey, ante*, 215.)

2. Where "the assignment does not except property which is not subject to levy, but property which the exemption act declares to be exempt:"

Held, the examination should be allowed as if no exception were contained in the assignment. (*Id.*)

3. Where, after such general assignment an application is made by creditors of the assignor "to ascertain whether or not certain property called a trade-mark belongs to the assigned estate:"

Held, "that can only be determined by learning the facts which give the trade-mark its value."

Held, also, that in such case it is proper that the order allowing such examination should "explicitly state what shall be the subject and the extent of the examination." (*Id.*)

4. The present application distinguished from the *Burnett case* (8 Daly, 363) in this, that "there the avowed object of the examination was not to aid the assignee in the administration of his trust, save in the way of obtaining testimony to be used in such actions as he might afterwards bring;" while "here it is not shown that the testimony is sought for use in any action hereafter to be brought." (*Id.*)

5. The sub-rule of rule 73 (*Moak's Underhill's Principles of Torts*, p. 632) and the rule laid down in *Kidd* agt. *Johnson* (9 Reporter, 729) cited and approved. (*Id.*)

ASSOCIATIONS.

1. The plaintiff is a corporation duly organized and formed under the laws of the state of Indiana, and its legal location is in the city of Indianapolis in said state. It commenced business in this state October 2, 1880, eight months previous to the adoption of chapter 256 of the Laws of 1881. Among the objects of the plaintiff's organization is the establishment of a "relief fund from which members of this association who have complied with all its rules and regulations may receive a benefit on a sum not exceeding three thousand dollars, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled, or upon his death." The resources of the plaintiff are derived entirely

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from voluntary donations and admission fees, dues and assessments from members and the interest thereon. The plaintiff claims the right to do business in this state, and seeks to enjoin the defendant, the superintendent of insurance from interfering in any way with its operations, insisting that he has wantonly and maliciously sought to interrupt its operations and business :

Held, that the plaintiff is amenable to the Laws of 1881 and not to the general insurance statutes of the state, and that the article of its by-laws which provides for the payment of a benefit to a member upon his attaining the age of seventy-five years, is one rendered proper by the occurrence of a physical disability of a member within the true intent and meaning of these words as used in the act aforesaid.

Held, also, that as the plaintiff has complied with all the requirements of the act of 1881, it is entitled to carry on its operations in this state unmolested by any improper interference from the defendant or any other person.

Held, further, that it is not the office of an injunction nor the prerogative of the court to dictate to an officer of the state his views as to the proper construction of a law. He can only be compelled to do what the law commands him to do, or be restrained from doing an act to another's injury which he has no power to do, but he cannot, by injunction, be prevented from expressing in a lawful and proper manner his views of the legality of a business when he is actuated by no malice or evil intent. (*Supreme Council of the Order of Chosen Friends* agt. *Fairman*, ante, 386.)

ATTACHMENT.

1. A statement in an affidavit upon an application for an attachment

that "the defendant is indebted to the plaintiff in the sum stated, and that he is justly entitled to recover said sum," does not satisfy the requirement of section 636 of the Code, that the affidavit must show that the debt due was over and above "all counter-claims." (*Ruppert* agt. *Haug*, ante, 364.)

2. Where an application to vacate an attachment is made to the court, upon notice, the presiding judge need not be the one who granted the attachment. (*Id.*)

3. A receiver of a foreign national bank, though not a party to the action, has such a *status*, under section 682 of the Code of Civil Procedure, as will authorize him to move to set aside attachment proceedings. (*People's Bank of New York* agt. *Mechanics' National Bank of Newark*, ante, 422.)

4. There is nothing in the section which requires the applicant to become a party to the action. It is the practice to allow such motions to be made without imposing upon the applicant the condition that he shall ask to be made a party to the action in which the attachment was issued. (*Id.*)

5. Although the supreme court of this state has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another state, an attachment which has been issued in such action against its property in this state will be vacated upon positive proofs of its insolvency. (*Id.*)

6. Where goods consisting of under wear, neckties, shirts, jewelry, gloves, umbrellas, &c., were levied upon under an attachment and sold at auction, under direction of the court, as "perishable:"

Held, that the fact that goods will depreciate in value because of changes in their styles and

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fashions, is not of itself sufficient under section 656 of the Code of Civil Procedure to render the property perishable, it being the fashion, not the article that is perishable. (*Fisk* agt. *Spring, ante*, 510.)

7. Kid gloves, which are liable to have their value destroyed by spots, come within the definition of perishable, but woolen goods, though liable to be moth eaten, do not, as they can be protected from such liability. (*Id.*)

8. BRADY, J. (dissenting). *Held*, that where goods would suffer in value by being kept, if they did not perish absolutely, by reason of the change of fashion or by injuries from moths, they are to be regarded as perishable. (*Id.*)

9. Where an attachment against property is vacated, the taxable costs and all reasonable counsel fees, on a motion necessary to get rid of the attachment, may be recovered upon the undertaking filed upon obtaining the attachment. (*Baere* agt. *Armstrong et al.*, *ante*, 515.)

10. If the attaching creditor pays such taxable costs, the amount so paid reduces, *pro tanto*, the liability assumed by the undertaking, and must be allowed in the action brought thereon. (*Id.*)

11. Where the motion at special term to vacate the attachment was granted, should the sureties in such an undertaking be held liable for the costs and expenses made by their principal, by appeal, to reinstate his attachment, *quære*? (*Id.*)

12. Upon an examination of one Brooks, ordered under section 651 of the Code of Civil Procedure, because of his refusal to furnish the sheriff with a certificate stating the amount, nature and description of property in his pos-

session belonging to the defendant, against whom a warrant of attachment had been issued, it appeared that Brooks had at the time of the issue of the warrant a note belonging to the defendant secured by a mortgage, which had been put by Brooks in the safe of another person and there locked up:

Held, that the court should make an order requiring Brooks to deliver the note and mortgage to the sheriff. (*Hall* agt. *Brooks*, 25 *Hun*, 577.)

13. In an action to recover a debt due from a firm, an attachment was issued against the property of one partner only, on the ground that he had absconded. Certain subsequent attaching firm creditors, on proof that the firm was insolvent, moved to vacate the attachment, on the ground that the partner against whose property the attachment was issued had no interest in the firm property upon which the attachment could be levied:

Held, that the attachment should not be vacated. (*Buckingham* agt. *Swozey*, 25 *Hun*, 84.)

14. The fact that one of two partners has been guilty of fraudulent acts, and has thereafter absconded from the State, will not authorize the granting of an attachment against the firm property, where it appears that the other partner has remained in this State, engaged in carrying on his business, and has been guilty of no actual misconduct. In such a case the attachment can only be issued against the property of the absconding and guilty partner. (*Bogart* agt. *Dart*, 25 *Hun*, 395.)

15. Judgment debts and money collected on execution by and in the hands of a sheriff are liable to attachment under process issued in an action against the judgment creditor. (*Wehle* agt. *Conner*, 83 *N. Y.*, 231.)

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16. The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor. (*Id.*)
17. Where property of an attachment debtor is already in the hands of the sheriff to whom the attachment is issued, no formal levy or notice is necessary to subject it to the lien of the attachment. (*Id.*)
18. Where, in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor:
Held, that the fact that the sheriff failed to make a valid levy by virtue of the execution did not destroy or weaken the effect of the proof in mitigation; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection; in either event, while the attachments remained in force plaintiff was only entitled to nominal damages. (*Id.*)
19. Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment:"
Held, that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act. (*Id.*)
20. It was claimed that as two of the judgments were for costs they were not affected by the attachments, because of the precedence of the attorney's lien:
Held, that until the lien was asserted by the attorney, who alone was entitled to and could claim it, the judgments were the property of the plaintiff; and that they were to be so considered here, as there was no offer to prove that the attorney had given notice of his claim or had attempted to enforce it. (*Id.*)
21. It was claimed that plaintiff was entitled to a judgment for the surplus of her judgments over the amounts claimed in the attachments:
Held, untenable; that as the sheriff was required to keep so much of the property as would satisfy the attachment demands, with costs and expenses (*Code of Procedure*, sec. 232; *Code of Civil Procedure*, sec. 641), he had a right to exercise a reasonable discretion as to the amount so to be retained. (*Id.*)
22. An attorney for the successful party in an action by whom a judgment was procured is not an "individual holding such property" within the meaning of the provision of the Code of Procedure (sec. 235), authorizing the execution of an attachment by service of a copy. (*In re Flandrow*, 84 N. Y., 1.)
23. Accordingly *held*, where a judgment in favor of an attachment debtor was attempted to be attached by service of a copy of the warrant upon one of the attorneys for said debtor, in the action wherein said judgment was rendered, that the attachment was not properly executed, and that a purchaser at sheriff's sale under execution and order of the court in the attachment suit acquired no title. (*Id.*)
24. *It seems* that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor. (*Id.*)
25. The plaintiff, a national bank organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on

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bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the supreme court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands:

Held, that, under and within the meaning of the provision of the Code of Procedure (*sec.* 427), providing that an action against a foreign corporation may be brought in the supreme court by a plaintiff not a resident of this state, "where the cause of action shall have arisen in this state," plaintiff was to be regarded as a non-resident; that the cause of action arose in this state, and that, therefore, the court had jurisdiction of the action. (*Hibernia Nat. Bk. agt. Lacombe*, 84 N. Y., 367.)

26. After the delivery of the draft to plaintiff, the M. & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property:

Held, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment. (*Id.*)

27. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment (2 R. S., 221, *sec.* 6, *sub.* 4). (*Dunford agt. Weaver*, 84 N. Y., 445.)

28. It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been

issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed. (*Id.*)

29. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*. (*Id.*)

30. Where a sheriff is sued for an escape from custody under such an attachment, the plaintiff is entitled to recover the damages sustained by him (*Code of Civil Procedure, sec.* 158), to wit: the sums awarded to him by the surrogate's decree, with interest from its date. (*Id.*)

31. The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial:

Held, that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provision of the Code of Civil Procedure (*sec.* 158) in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. (*Id.*)

32. In such an action the fact of the insolvency of the debtor is no defense. (*Id.*)

33. The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which, on payment, were assigned to plaintiff:

Held, that this was not a pay-

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ment and extinguishment of the claims. (*Id.*)

34. Two attachments were issued by the surrogate and arrests made before said Code went into effect; the escape occurred thereafter; it was claimed that the provision of the Code did not apply:

Held, untenable, as the cause of action was, not the issuing of process and arrest, but the escape. (*Id.*)

35. The right to an attachment having been conferred by statute is limited by its provisions. (*Blossom* agt. *Estes*, 84 N. Y., 614.)

36. Under the provisions of the Code of Procedure (*sec.* 227), as amended by section 6, chapter 723, Laws of 1866, declaring that for the purposes of an attachment an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and, upon omission so to do, the jurisdiction which attached on granting the warrant ceased. (*Id.*)

37. An attachment rendered void by failure to serve or publish summons within the time specified was not revived and validated by the appearance of the defendant in the action. (*Id.*)

38. An order vacating an attachment because of such failure, as it involves simply a question of jurisdiction, is reviewable here. (*Id.*)

ATTORNEY.

1. An attorney and counselor-at-law is not liable in an action for false imprisonment where, in a judicial proceeding, he presents papers to a court of competent jurisdiction, and the court, after consideration

and after hearing and acting judicially upon the papers, grants an order of arrest, and such papers are afterward set aside upon the ground of error in issuing them. That error of the court not only protects the attorney, but everybody else. The attorney is only liable for irregularity in practice. (*Fisher* agt. *Langbein*, *ante*, 238.)

2. It is one of the risks and hazards of the sheriff's office to determine at his peril whether he can or cannot further detain a party in his custody under a certain writ or process (*See Fisher* agt. *Raab et al.*, 56 *How.*, 218, 223; 58 *How.*, 221; 81 N. Y., 235). (*Id.*)

3. In order to give the right of proceeding summarily against an attorney, it is essential that he was intrusted in the transaction by reason of his professional character, and that he was acting as an attorney in respect to the particular matter which is the ground for the application. (*Matter of Husson*, *ante*, 358.)

4. Where an attorney is engaged in a personal transaction with his client, unconnected with his professional character, the fact that he was at such time employed as the attorney for the petitioner in other matters, will not authorize the application. (*Id.*)

5. In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination. (*In re an Attorney*, 83 N. Y., 164.)

6. Accordingly, *held*, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue, was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the

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"right to issue the commission and the legality of the evidence taken thereunder." (*Id.*)

7. An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached. (*See Wehle* agt. *Conner*, 83 N. Y., 231.)
8. When bond and mortgage of an attorney of one of the parties in a partition suit was deposited in good faith by the referee to sell as part of a fund directed to be deposited with and invested by the county treasurer in trust and the *cestuis que trust* with full knowledge have for years received the income they cannot repudiate the investment and impose it upon the referee. (*See Wiggins* agt. *Howard* [Mem.], 83 N. Y., 613.)
9. The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment. (*Root* agt. *Wright*, 84 N. Y., 72.)
10. Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule prohibits him from testifying to such communications in an action between his clients and a third person. (*Id.*)
2. Under the Code of Civil Procedure in an action in which the defendant is liable to arrest, and in which the plaintiff is unsuccessful in his suit, the latter may be arrested and imprisoned by the defendant's attorney on a claim for costs. (*Parker* agt. *Spear*, ante, 394.)
3. And this is true, although the plaintiff did not exercise his right to arrest the defendant, and although he may have a perfectly good case, but loses his suit on a mere technicality. (*Id.*)

ATTORNEY-GENERAL.

1. Where, in an action to compel the removal from an East river wharf of a building erected by the owner of the wharf for the exclusive benefit of his own business, and without a written license from the department of docks, it appears that the wharf has been used by the public as a highway and for the loading and discharging of sailing vessels engaged in foreign commerce and having a draft of more than eighteen feet of water:

Held, that the building is an incumbrance, an interference with the dominant right of the public, and must be removed, and that the attorney-general has the right to bring the action. (*The People* agt. *Macy*, ante, 65.)

ASSAULT AND BATTERY.

See COHOES (CITY OF).
Matter of Coughlin, ante, 34.

ASSIGNMENT.

1. The attorney, under section 66 of the Code of Civil Procedure, has an absolute lien for his compensation. (*Lansing* agt. *Ensign*, ante, 363.)
1. Where S. made an assignment to P. for the benefit of creditors, and one of the creditors, who was both a preferred and general creditor, signed, under mistake, a general release to both assignor and assignee, supposing it to be simply

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an agreement that the assignee be allowed to deliver to the assignor goods belonging to the assigned estate, so as to promote a composition or compromise between the creditors and the assignor, and the assignee objects to the claims of such creditor, because of such release, and refuses to allow the claims on that ground and also on the further ground that the said creditor had received promissory notes of the assignor on the execution of said release, which notes were dated subsequent to the assignment, and the release also recited another note representing the preferred portion of the creditor's claim, but made and dated prior to the assignment; and the creditor obtained judgments on all the notes while the assignment was being executed, but was paid no money on account of either the notes or the judgments. The creditor meantime also procuring a judgment in a court of equity setting aside the said release as against the assignor on the ground of mistake, but not making the assignee a party to such equitable suit, and there being no evidence that the assignee was privy to the making of the release, but some evidence to the contrary:

Held, on motion of the creditor to confirm the report of a referee reporting in favor of allowing the claims of such creditor as good and valid claims, and that they have been established and should be paid out of the assigned estate. "The referee's report as to the claims of such creditor seems entirely correct and should be confirmed." (*Matter of Schaller, ante*, 40.)

2. So, where, on a motion by assignee to confirm, in whole or in part, a report by the same referee appointed to take and state the assignee's accounts, there is an absence of proof of service of notice to creditors to produce their claims before the assignee, as prescribed by the rules of this court,

and, secondly, where it appears affirmatively that the citation was not served upon certain creditors who had filed claims with the assignee:

Held, that the order of reference to take and state the accounts was entirely irregular and conferred no authority upon the referee; that the referee cannot cure this irregularity nor usurp the powers of the court. These creditors had the right to be heard upon the application for a reference, and neither the assignee nor any other person or court can deprive them of that right.

Held, also, where it further appears from the papers submitted that the citation was served upon the creditors whom the assignee claims to have served by mail, and it does not appear that there was any authorization by the court that the service should be made in that way, that the report cannot be confirmed. (*Id.*)

3. Where, in a proceeding under the general assignment act by a creditor to establish claims as a general and preferred creditor, which have been disallowed by the assignee, the creditor prevails on a reference, the referee reporting to the court that the claims are valid claims and established, and that they should be paid by the assignee out of the assigned estate, and the court at special term, on motion, confirms such report of the referee, with costs and disbursements:

Held, "the same costs and disbursements are allowed as to a successful plaintiff in an action, by the Code of Procedure, with five per cent allowance upon the amount reported due, with ten dollars costs of motion to be paid by the assignee out of the assigned estate." (*Id.*)

BAIL.

See SHERIFF.

Watt agt. Reilly, ante, 350.

Douglass agt. Haberstro, ante, 455.

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1. Under the act of 1879 (*chap. 390 of Laws of 1879*) courts of special sessions have exclusive jurisdiction to try "charges for petit larceny not charged as a second offense" and the supreme court has no power to let to bail one charged with that offense. (*People ex rel. agt. Dutcher*, 83 N. Y., 240.)

BANKRUPTCY.

1. Where an attachment is issued, and property is levied upon thereunder, in an action against defendants, who, after the commencement of the action become bankrupt, and for whom curateurs or assignees are appointed by a tribunal of a foreign nation having jurisdiction in the matter, it is proper to bring such curateurs or assignees, upon their own motion, into the action as additional parties defendant. (*Lee agt. Pfeiffer*, 25 Hun, 97.)

BAR.

See TRESPASS.

Law agt. McDonald, ante, 340.

BENEVOLENT SOCIETIES.

1. Under section 1919 of the Code of Civil Procedure an action may be maintained by a member of a benevolent society against the treasurer of such society to recover from the funds of the same, certain moneys alleged to be due him by reason of sickness. (*Poultney agt. Bachman*, ante, 466.)
2. The action was brought against a lodge of odd fellows by one of its members to recover "sick benefits" to which he claimed to be entitled. The plaintiff had joined the lodge years ago, when its by-laws provided that in case of sickness every member should receive a specified sum weekly "during

his sickness or disability." Another section empowered the lodge to alter or amend the by-laws whenever deemed expedient. After the plaintiff had been taken sick, and while he was in receipt of the weekly sum allowed him, a by-law was passed reducing the amount of the payments from four dollars to one a week:

Held, that the lodge was bound to continue paying the plaintiff the full amount to which he was entitled when he became sick. (*Id.*)

3. Although the lodge had the right to change its by-laws, yet, whatever sum any member is entitled to when he is taken sick must be treated as a fixed amount, which cannot be subsequently reduced during the continuance of the sickness. The right to this is a vested right which cannot be annulled or varied while the disability lasts. (*Id.*)

BILL OF PARTICULARS.

1. In an action charging physicians with a conspiracy, causing the incarceration of the plaintiff in an insane asylum, they answered that from their professional examination and knowledge of the plaintiff's health and mental condition, from frequent observation of plaintiff's actions, conduct and habits, and from information as to the same, they believed him to be insane:

Held, that it was an improper exercise of discretion for the court to order the defendants to furnish to the plaintiff a bill of particulars, specifying the time and place, when and where the actions of the plaintiff so referred to occurred, and what such actions were, when and where the observations referred to were made and what was observed, and to preclude the defendants from giving evidence of any matter in the premises not specified in the

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bill of particulars (*Higenbotham* agt. *Green*, 25 *Hun*, 214.)

2. The power of the supreme court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff as of the defendant. (*Dwight* agt. *Germania L. Ins. Co.*, 84 *N. Y.*, 493.)
3. The word "claim" in the provision of the Code of Civil Procedure (*sec.* 531), providing that the court may "in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party," includes not merely a ground or cause of action upon which some affirmative relief is asked, but also, in case of a defendant, whatever is set up by him, based upon facts alleged as the reason why judgment should not go against him. (*Id.*)
4. The said provision does not take away the power the court previously had of affixing a disability to disobedience of an order directing a bill of particulars. (*Id.*)
5. In an action upon a policy of life insurance certain breaches of warranty in answering untrue questions in an application were set up as a defense, to wit, that the insured stated that he had made no other application for insurance which had been refused, whereas he had made such applications to companies unknown to defendant; also that he had not had bronchitis or spitting of blood, when in fact he had had both prior to the application; also that he had other insurance on his life in addition to those specified by him. The court, on motion for a bill of particulars, directed defendant to deliver to plaintiff's attorney a statement of the particular times and places at which it expected to prove that the insured had bronchitis and spitting of blood, also stating what other insurance in addition to those specified the

defendant expects or intends to prove the insured had, specifying the name of the company and the date and amount of the policy; also stating what applications for insurance were made which had not led to an assurance, specifying name of company, time when application was made, and date of application. The order also provided that defendant should be precluded from giving evidence on the trial of matter not specified in such bill of particulars. The general term modified the order so as to allow defendant to give in evidence general admissions and declarations of the insured without regard to the bill of particulars:

Held, that the court had power to grant such an order, and that the granting of it in this case was not such an abuse of discretion as to authorize a review of it in this court. (*Id.*)

6. The affidavits upon which the motion was made stated that plaintiffs do not know to what instances the said averments of the answer refer, but did not state that they do not know of some instances of the kind referred to. It was claimed that these allegations were not sufficient to authorize the court to entertain the motion:

Held, untenable; that the affidavits made a case for the exercise of the discretion of the court. (*Id.*)

BOND.

See *SHERIFF*.

Reilly agt. *Coleman*, *ante*, 289.

BROKER.

1. A broker to sustain an action for commissions must show direct employment of the principal, or a direct authority for him to treat with the agents of the principal. (*Harper* agt. *Goodall*, *ante*, 288.)

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2. The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown. (*Id.*)

BROOKLYN ELEVATED RAILWAY.

1. The Bruff Elevated Railway Company of Brooklyn was incorporated by an act passed May 26, 1874. The authority conferred upon it to appropriate the streets in the city is contained in section 3 of that act and is as follows: (After reciting the route as fixed between the East river suspension bridge and Woodhaven, Queens county) the latter part of the act reads thus: "Or on such streets and avenues as may be named by the mayor and common council of the city of Brooklyn as being more suitable for carrying out the objects contemplated in the erection of said railway." The common council passed a resolution, which, in effect, authorizes an elevated railroad to be constructed upon Fulton street and Myrtle avenue and several other streets not named in the said act of incorporation. The mayor vetoed the same. They claim the right to pass said resolution under the last clause of section 3 of the charter, and this nearly eight years after the corporate franchise was granted, and a considerable time after the railway company had appropriated the streets named in its charter to its corporate uses. The common council proposes to pass the resolution over the mayor's veto, and an injunction is sought by the plaintiff, who sues in behalf of himself and others similarly situated to restrain such proposed action.

Held, first. That the court has the power to prevent the commission of illegal acts by the members of the common council in a

proper case and at the suit of the proper parties. The members of the common council are mere agents with defined and limited powers. While the court cannot rightfully control the proper exercise of the discretion vested in them, yet when they threaten an abuse or illegal exercise of such discretion, and especially when they claim the right to exercise powers which they do not possess, it is the duty of the court to interpose its authority whenever it becomes necessary for the protection of public or private rights or interests.

Second. The right of the plaintiff to maintain this action rests: First. Upon the familiar principle that one who will be especially injured by the creation of a public nuisance, may invoke the interposition of the court to prevent it. Second. Upon that provision of the charter of the city of Brooklyn, which makes the aldermen the trustees, and the resident taxpayers *cestuis que* trustees in respect to the property intrusted to the care of the former; and, Third. Upon the act of 1881, chapter 531, which expressly authorizes the prosecution of all officers, agents, &c., acting on behalf of any municipal corporation, by taxpayers, by action to prevent any illegal act.

Third. That the consent of the board of aldermen is not sufficient without that of the mayor. The statute plainly requires the consent of both. The unanimous consent of the common council would not be an effectual execution of the power, much less would the consent of two-thirds of the members thereof, however manifested. Nor was the exercise of the power committed to a single board composed of the mayor and common council. But if such was the nature, it could be exercised only upon a meeting of all, or a meeting of a majority, upon due and reasonable notice.

Fourth. That the company hav-

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ing elected to adopt the route designated in the charter, and the mayor and common council having acquiesced therein, such election has barred all parties concerned, and has put an end to the power to change the route so designated.

Fifth. That the power to change the route was also annulled by the amendment to article 3 of the constitution, which took effect January 1, 1875.

Sixth. That the action of the common council would be ineffectual for lack of power in the receivers of the railroad company to accept the new privileges or franchises which the common council purpose to confer. (*Negus* agt. *City of Brooklyn*, ante, 291.)

BURDEN OF PROOF.

1. The burden of proof is on plaintiff to prove negligence, and failing to meet such burden plaintiff cannot recover. (*Fleming* agt. *Northampton National Bank*, ante, 177.)
2. Although there may be found fragmentary evidence in favor of the party upon whom the burden of proof is imposed, yet if the testimony, assuming it to be true, and the inferences which may fairly be drawn therefrom are, in the opinion of the court, entirely insufficient to authorize the jury to find a verdict in favor of the party upon whom the *onus* of proof is cast, it is the duty of the court to direct the jury what verdict to render. (*Id.*)
3. Negligence is not necessarily a question for the jury, and when the evidence is too slight to justify a verdict in favor of plaintiff, the court should direct a verdict in favor of the defendant. (*Id.*)

BANK.

1. Banks who have in their possession collateral security for the pay-

ment of loans are called upon to take the same care that good business men or persons or corporations of their class ordinarily take of such bonds. They are liable for want of ordinary care. (*Fleming* agt. *Northampton National Bank*, ante, 177.)

CALENDAR.

See PREFERENCES.

Robertson agt. *Schellhaas et al.*, ante, 489.

1. Where the right to a preference depends upon facts which do not appear upon the pleadings, a copy of the order granting the preference must be served with or before the notice of trial or argument. (*City National Bank of Dallas* agt. *National Park Bank*, ante, 495.)
2. By serving a notice of trial before making a motion to have the cause preferred, the right to such preference is waived. (*Id.*)
3. An action for an accounting and partition and other relief is not entitled to a preference because the construction of a will is incidentally involved therein. (*Peyser* agt. *Wendt*, 84 N. Y., 642.)
4. To give a cause a preference under the Code of Civil Procedure (sec. 791, subd. 5), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. (*Id.*)

CASE.

1. When after judgment was entered an appeal was at once taken, a case made and served and amendments proposed and noticed for settlement, the appellant took no further steps to have the case settled for over three years:
Held, that a motion to then settle the case was properly denied

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for laches, notwithstanding the judge before whom the case was tried was never afterward able to administer his judicial functions.

Held, further, that although the appellant may not have his case settled by a judge, he may file the case and exceptions which have been settled by lapse of time. (*Ingersoll* agt. *Smith*, ante, 474.)

2. *It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the general term, it is not correct practice for respondent's attorney to return the case, and, upon failure to serve others, to enter order dismissing appeal. (*Bliss* agt. *Hoggson*, 84 *N. Y.*, 667.)

3. *It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed. (*Id.*)

CERTIORARI.

1. Code of Civil Procedure, section 2138, requiring the hearing on *certiorari* to be on the writ, the return and the papers on which the writ was granted, does not allow the return to be overthrown by the statements contained in such papers—such papers only establish facts as to which the return is silent. (*See People ex rel. McCarthy* agt. *French*, 25 *Hun*, 111.)

CHARGE TO JURY.

See INSANITY.

The People agt. *O'Connell*, ante, 436.

CHARITABLE USES.

1. The testator, in his will, directed his executors "to apply" a por-

tion of his estate "to such charitable institutions, which are under Protestant management, as my said executors, or a majority of them who may act as such, may choose:"

Held (in this action to test the validity of this clause), that, though the question is one of difficulty, the bequest is valid, and should be enforced according to the directions of the testator; and the charitable institutions chosen by the executors from the class designated should be brought in as parties defendant (*Power* agt. *Cassidy*, 79 *N. Y.*, 327, applied). (*Gumble* agt. *Pfuger*, ante, 118.)

CHATTEL MORTGAGE.

See MORTGAGE.

Thurber agt. *Minturn*, ante, 27.

CODE OF PROCEDURE.

1. Section 71—The bringing of an action upon a judgment recovered in the supreme court of this state without first obtaining the leave of the court so to do, as required by section 71 of the Old Code is not a mere irregularity which is waived by the omission of the defendant to raise the objection, but the omission to obtain such leave renders the judgment invalid, and the same will be set aside upon the application of the administrator of the deceased judgment debtor, made sixteen years after the entry of the said judgment. (*Farish* agt. *Austin*, 25 *Hun*, 430.)
2. Section 88—By the amendment of this section of the Code of Procedure in 1870 (*sec. 5, chap. 741, Laws of 1870*), striking out married women from the list of persons against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed

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upon the same footing as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment.

Accordingly, *held*, in an action of ejectment brought by a married woman, that an adverse possession of twenty years was a good defense. (*Clarke et al. agt. Gibbons et al.*, 83 N. Y., 107.)

3. Section 111—Where an action is brought for the recovery of real property by a grantee in the name of the grantor, under this section of the Code, against parties holding and claiming title adversely, and pending the action the grantee dies, such action may be continued with leave of the court in the name of the decedent's grantee or devisee, and for his or her benefit. (*Ward agt. Reynolds et al.*, *ante*, 183.)

4. Sections 116, 448—Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant (*Sec. 116, sub. 2*).

Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the

infants, D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered:

Held, that this was sufficient, both under said provision of the Code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 R. S., 317, sec. 3), which are made applicable to actions for partition under the Code (*sec. 448*); and, it appearing that the court had jurisdiction of the subject-matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants. (*Gottendorf agt. Goldsmith*, 83 N. Y., 110.)

5. Section 150—Plaintiff's complaint alleged in substance that under color of a contract defendant fraudulently obtained money from the state by means of false representations, false vouchers and collusion with state officers. Defendants set up as a counter-claim a balance due them from the state for work done under the contract. To the answer a reply was served:

Held, that the cause of action set up as a counter-claim was not one arising out of the transaction upon which plaintiff's claim was founded, within the meaning of this section of the Code of Procedure, and that a counter-claim founded on contract was not proper in such an action. (*People agt. Dennison*, 84 N. Y., 272.)

6. Section 227—Under the provisions of this section of the Code of Procedure, as amended by section 6, chapter 723, Laws of 1866, declaring that for the purposes of an attachment an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and upon omission so to

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- do, the jurisdiction which attached on granting the warrant ceased. (*Blossom et al. agt. Estes*, 84 N. Y., 614.)
7. Section 235—An attorney for the successful party in an action by whom a judgment was procured is not an "individual holding such property" within the meaning of the provision of this section of the Code of Procedure authorizing the execution of an attachment by service of a copy. (*Matter of Flandrov*, 84 N. Y., 1.)
8. Section 275—Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within his issue." (*Stevens agt. Mayor, etc., of City of New York*, 84 N. Y., 296.)
9. Section 338—Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by this section of the Code of Procedure, containing among other things this provision that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the general term. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the general term, *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the
- appeal to the supreme court. (*Church agt. Simmons*, 83 N. Y., 261.)
10. Section 427—Under the provision of this section of the Code of Procedure authorizing the bringing of an action against a foreign corporation by "a resident of this state for any cause of action," *held*, that an action was properly brought in this state by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that state, the will having been admitted to probate in that state, and afterward, upon production to the surrogate of an authenticated copy having been admitted to probate in this State. (*Palmer agt. Phoenix Mutual Life Ins. Co.*, 84 N. Y., 63.)
11. Section 427—The plaintiff, a national bank organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. and T. bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the supreme court and an attachment issued, which was served on said bankers, who had funds of the M. and T. bank in their hands:
Held, that, under and within the meaning of the provision of this section of the Code of Procedure, providing that an action against a foreign corporation may be brought in the supreme court by a plaintiff not a resident of this state, "where the cause of action shall have arisen in this state," plaintiff was to be regarded as a non-resident, that the cause of action arose in this state; and that, therefore, the court had jurisdiction of the action. (*Hibernia National*

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Bank agt. Lacombe et al., 84 N. Y., 367.)

CODE OF CIVIL PROCEDURE.

1. Section 17 — The provision of this section of the Code of Civil Procedure authorizing a convention of the general term justices and the chief judge of the superior court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code. (*Formerly agt. McGlynn et al.*, 84 N. Y., 284.)

2. Section 66 — The attorney under this section, has an absolute lien for his compensation. (*Lansing agt. Ensign, ante*, 363.)

3. Sections 66, 549, 1487 — Under the Code of Civil Procedure in an action in which the defendant is liable to arrest, and in which the plaintiff is unsuccessful in his suit, the latter may be arrested and imprisoned by the defendant's attorney on a claim for costs

And this is true, although the plaintiff did not exercise his right to arrest the defendant, and although he may have a perfectly good case, but loses his suit on a mere technicality. (*Parker agt. Spear, ante*, 394.)

4. Section 158 — Where a sheriff is sued for an escape from custody under an attachment against an administrator directing the collection of interest on the decretal sum named in it, the plaintiff is entitled to recover the damages sustained by him under this section, to wit: the sums awarded to him by the surrogate's decree, with interest from its date.

The complaint, in an action against a sheriff for an escape under an attachment of a surrogate,

alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial:

Held, that a motion for a non-suit, because of failure to prove such averment, was properly denied, as under the provision of this section of the Code of Civil Procedure in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. (*Dunford agt. Weaver*, 84 N. Y., 445.)

5. Section 184 — A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of this provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (*sub.* 4), and an advertisement of the premises for sale is a "seizure" within said provision.

Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired:

Held, that he had authority and was bound to proceed with and complete the sale. (*Union Dime Savings Bank agt. Anderson*, 83 N. Y., 174.)

6. Section 309 — The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for the payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts

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and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each:

Held, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of this section of the Code of Civil Procedure in reference thereto, as there was no "recovery," or "claim" for the payment of any fixed sum, and "the subject-matter involved" was plaintiffs' interest when ascertained, which proved to be nothing. (*Weaver et al. agt. Ely et al.*, 83 N. Y., 89.)

7. Sections 310, 3284 — Under these sections of the Code of Civil Procedure the clerk of the city court of Brooklyn is not entitled to retain to his own use any of the fees received by or the fines paid to him, but must account therefor and pay the same into the county treasury. (*Matter of fees of Clerk of City Court of Brooklyn*, 25 Hun, 593.)

8. Section 340 — Chapter 480 of the Laws of 1880, which purported to increase the jurisdiction of the county courts from one to three thousand dollars, is now of no force or effect, for two reasons:

First. Because it attempted to amend a law which had been already repealed in express terms.

Second. Because it is in conflict with that provision of the constitution, which, by necessary implication, limits the jurisdiction of the county courts in this class of actions to those cases "in which the damages claimed shall not exceed \$1,000" (*This is adverse to Sweet agt. Flannagan*, 61 How., 327). (*Lenhard agt. Lynch*, ante, 56.)

9. Sections 376, 382, sub. 7 — These sections of the Code of Civil Procedure, prescribing the times within which actions upon judgments must be brought, relate only to the remedy by action, and

do not affect the remedy by execution. (*Kincaid agt. Richardson*, 25 Hun, 237.)

10. Sections 382, 383 — In a suit against the city for damages for injuries sustained from falling upon a crosswalk in which the complaint alleges that defendant notwithstanding it was its duty to keep the streets in good order and repair and not to suffer the ice or snow to remain in such condition on the crosswalks as to make it unsafe and dangerous for foot passengers, had improperly, carelessly, negligently and unlawfully suffered ice and snow to remain upon the crosswalk where plaintiff fell, in such a condition as to render it dangerous for ordinary use:

Held (upon demurrer to answer setting up statute of limitations), that subdivision 5 of section 383 of the Code of Civil Procedure prescribing a limitation of three years for actions based upon negligence does not apply, and that defendant's alleged neglect in suffering ice and snow to remain on the crosswalk so as to be unsafe and dangerous to foot passengers was a wrongful act within the purview of section 382 prescribing six years as a limitation to actions arising for such cause. (*Dickinson agt. The Mayor, &c., of New York*, ante, 255.)

11. Sections 426, 471 — Where, in a foreclosure suit, the summons was personally served upon two of the defendants, minor children, under the age of fourteen, of the mortgagor, who died intestate before the action was commenced, but was not served upon their mother or general guardian:

Held, that the service was not such as to give the court jurisdiction over the person or property of the infants, even though a guardian *ad litem* appointed for them appeared in the action and put in an answer for them; and a judgment of foreclosure of the

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- mortgage and sale thereunder cannot be validated by acts done subsequent to such judgment and sale. (*Bellamy* agt. *Guhl*, *ante*, 460.)
12. Section 426 — Under the provision of this section of the Code of Civil Procedure (*sub.* 3), which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge; when a sheriff has an office in the city or village where the county courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 *R. S.*, *sec.* 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. (*Dunford* agt. *Weaver*, 84 *N. Y.*, 445.)
13. Section 450 — Under this section, in an action against a married woman for her personal tort, it is not necessary to join her husband as a defendant, and he is not a proper party to such action. (*Fitzgerald* agt. *Quann*, *ante*, 331.)
14. Section 451 — *It seems* that the provision of this section of the Code of Civil Procedure, in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition. (*Bergen* agt. *Wyckoff*, 84 *N. Y.*, 659.)
15. Section 452 — In action to annul a general assignment, creditors who are preferred in it are entitled to be made parties to it. (*Chandler* agt. *Powers*, 25 *Hun*, 445.)
16. Section 488 — Special demurrers as known to the former practice were abrogated by the Code; and no pleading is now demurrable unless it is subject to one or more of the objections specified in the provisions of the Code, defining the grounds of demurrer. (*Marie et al.* agt. *Garrison*, 83 *N. Y.*, 14.)
17. Section 501 — Under this section, in an action for divorce *a vinculo*, a defendant may have affirmative relief. (*Finn* agt. *Finn*, *ante*, 83.)
18. Section 511 — Where, in an action brought to foreclose a mortgage, the defendant, without denying any of the allegations of the complaint, alleges in his answer that a payment has been made upon the bond and mortgage, the plaintiff may admit the payment and move upon notice, under this section of the Code of Civil Procedure, for leave to enter judgment for the balance due under the allegations of the complaint, after deducting the payment. (*Hall* agt. *Holt*, 25 *Hun*, 277.)
19. Sections 515, 516 — Though failure to reply, in a case where a reply is necessary under the Code, does not prevent the party from bringing his cause on for trial, yet a motion by plaintiff to place the cause on the special circuit calendar was properly denied, for the reason that plaintiff had not served a reply, because the counter-claim being admitted there was no issue, the only question being as to the amount of damages. (*Adams* agt. *Roberts*, *ante*, 253.)
20. Section 531 — The word "claim" in the provision of this section of the Code of Civil Procedure, providing that the court may "in any case direct a bill of particulars of the claim of either party to be delivered to the adverse party," includes not merely a ground or cause of action upon which some affirmative relief is asked, but also, in case of a defendant, whatever is set up by him, based upon

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facts alleged as the reason why judgment should not go against him.

The said provision does not take away the power the court previously had of affixing a disability to disobedience of an order directing a bill of particulars. (*Dwight et al. agt. Ger. Life Ins. Co.*, 84 N. Y., 493.)

21. Section 536 — In an action for seduction under this section of the Code of Civil Procedure, the defendant is only required to set forth in his answer the facts which he seeks to prove as "tending to mitigate or otherwise reduce the plaintiff's damages," when such facts tend to disprove malice, and so diminish or reduce the punitive or exemplary damages which the plaintiff may be entitled to recover. That section does not prevent him from proving, under a general denial, any facts which tend to diminish or reduce the actual damages which the plaintiff claims to have sustained. (*Wandell agt. Edwards*, 25 Hun, 498.)

22. Section 546 — *It seems* that the remedy for indefiniteness is not by demurrer but by motion. (*Marie et al. agt. Garrison*, 83 N. Y., 14.)

23. Section 549 — In an action brought under the provisions of the Revised Statutes to recover moneys alleged to have been lost in gaming, the defendant is not subject to arrest, as the statute does not expressly give the right of arrest; and it would be a forced and improper construction to say that the case was brought within this provision of the Code, which gives to a plaintiff the right to arrest a defendant where the action is for "an injury to property including the wrongful taking and detention or conversion of personal property." (*Tompkins agt. Smith*, ante, 499.)

24. Section 599 — An allegation in the

amended answer that "the executions were returned by the deputy having the same in charge, at the request and by the direction of the attorney of the plaintiff in said executions, without the knowledge, privity or consent of defendant (the sheriff)," does not constitute a defense under this section of the Code of Civil Procedure.

The return of the execution by the deputy or under sheriff before the return day was the act of the sheriff and was entirely voluntary on his part for aught that is alleged in the answer, and it constitutes no defense, either under the statute or independently of it. (*Douglass agt. Haberstro*, ante, 455.)

25. Section 635 — A person who has been induced to make advances upon the faith of forged bills, notes and acceptances, has sustained an "injury to personal property" within the meaning of these terms as used in subdivision 3 of this section of the Code of Civil Procedure, prescribing the cases in which an attachment may be granted. (*Bogart agt. Dart*, 25 Hun, 395.)

26. Section 636 — A statement in an affidavit upon an application for an attachment that "the defendant is indebted to the plaintiff in the sum stated, and that he is justly entitled to recover said sum," does not satisfy the requirement of this section of the Code, that the affidavit must show that the debt due was over and above "all counter-claims." (*Ruppert agt. Haug*, ante, 364.)

27. Section 640 — Where an attachment against property is vacated, the taxable costs and all reasonable counsel fees, on a motion necessary to get rid of the attachment, may be recovered upon the undertaking filed upon obtaining the attachment. (*Baere agt. Armstrong*, ante, 515.)

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28. Section 641 — It was claimed that plaintiff was entitled to a judgment for the surplus of her judgments over the amounts claimed in the attachments:

Held, untenable; that as the sheriff was required to keep so much of the property as would satisfy the attachment demands, with costs and expenses (*Code of Pro.*, sec. 232; *Code of Civil Pro. sec. 641*), he had a right to exercise a reasonable discretion as to the amount so to be retained. (*Wehle agt. Connor*, 83 N. Y., 231.)

29. Sections 649, 708, 1369 — In issuing an execution in a case where real property has been attached, the command to the sheriff should, among other things, require him to satisfy the judgment out of the real property belonging to the judgment debtor "on the day when the attachment was levied thereon," and on the day when the judgment was so docketed.

In this respect sections 649, 708 (*sub. 2*) and 1369 of the Code of Civil Procedure are all to have operation in harmony.

Where the notice of sale is correct as to date of the attachment lien, the execution and certificates of sale made thereon may, if inaccurate, be amended, *nunc pro tunc*, to conform to the fact. (*Woolworth et al. agt. Taylor*, ante, 50.)

30. Section 656 — Where goods consisting of underwear, neckties, shirts, jewelry, gloves, umbrellas, &c., were levied upon under an attachment and sold at auction under direction of the court, as "perishable:"

Held, that the fact that goods will depreciate in value because of changes in their styles and fashions, is not of itself sufficient under this section of the Code of Civil Procedure to render the property perishable, it being the fashion, not the article that is per-

ishable. (*Fisk agt. Spring*, ante, 510.)

31. Sections 650, 651 — Attachment — examination of a party refusing to give a certificate of the property of the debtor held by him — what proceedings may be taken. (*Buckingham agt. White*, 25 Hun, 441.)

32. Section 651 — Upon an examination of one Brooks, ordered under this section of the Code of Civil Procedure, because of his refusal to furnish the sheriff with a certificate stating the amount, nature and description of property in his possession belonging to the defendant, against whom a warrant of attachment had been issued, it appeared that Brooks had at the time of the issue of the warrant a note belonging to the defendant secured by a mortgage, which had been put by Brooks in the safe of another person and there locked up:

Held, that the court should make an order requiring Brooks to deliver the note and mortgage to the sheriff. (*Hall agt. Brooks*, 25 Hun, 577.)

33. Section 682 — A receiver of a foreign national bank, though not a party to the action, has such a *status*, under this section of the Code of Civil Procedure, as will authorize him to move to set aside attachment proceedings.

There is nothing in the section which requires the applicant to become a party to the action. It is the practice to allow such motions to be made without imposing upon the applicant the condition that he shall ask to be made a party to the action in which the attachment was issued. (*People's Bank of New York agt. Mechanics' National Bank of New-ark*, ante, 422.)

34. Section 683 — Where an application to vacate an attachment is made to the court, upon notice,

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the presiding judge need not be the one who granted the attachment. (*Ruppert* agt. *Haug*, ante, 364.)

35. Section 723—An order of the county court granting a motion to amend an answer under section 723 of the Code of Civil Procedure, affects "a substantial right," and is appealable (*See Bowen* agt. *Widner*, 12 *W. Dig.*, 525).

Upon such an appeal the merits will be considered. (*New* agt. *Aland*, ante, 185.)

36. Section 723—That executions were not tested, and that a body execution did not specify the time when it was returnable on such irregularities as might have been amended under this section. (*Douglass* agt. *Haberstro*, ante, 455.)

37. Section 723—This action was brought against the defendants, Remington's Agricultural Works, a corporation duly formed under the laws of this state, to recover for the breach of a contract alleged to have been made by it. The summons and complaint were served by delivering the same to Philo Remington, as one of the defendant's officers. In fact the contract was not made by the defendant, but was made, if at all, by a partnership consisting of Philo Remington, Samuel Remington and Eliphalet Remington, which had bought out the business of the defendant and was carrying on business under the name of the Remington Agricultural Company. Upon learning these facts the plaintiff, after issue had been joined, applied for leave to amend the summons and complaint by striking out the defendant's name and substituting therefor the names of the three partners:

Held, that under this section of the Code of Civil Procedure the court had power in its discretion to grant the amendment, (*N. Y.*

Milk Pan Co. agt. *Remington Works*, 25 *Hun*, 475.)

38. Sections 724, 783—A judgment entered without service of process is not within the remedial scope of these sections. (*Bellamy* agt. *Guhl*, ante, 460.)

39. Section 723—Under this section in an action upon a contract the general term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial. (*Harris* agt. *Tumbridge*, 83 *N. Y.*, 92.)

40. Sections 765, 1671—Where an action was commenced by A. against B. to foreclose a mortgage and, after *lis pendens* filed, B. conveyed the premises to C., and thereafter B. died and C. was made administrator of B., the action was revived and continued against C., as administrator, and a decree of foreclosure and sale was entered:

Held, that the action was properly revived. Under section 1671 of the Code of Civil Procedure, C., as a grantee subsequent to the filing of the *lis pendens*, is bound by all the proceedings in the action to the same extent as if he were a party and his equity of redemption was cut off by the decree.

Whether a judgment *in personam* for deficiency could be entered against C., *quære*? (*Weyh* agt. *Boylan*, ante, 397.)

41. Section 769—It is only such motions as are to be upon notice that are required to be made within the judicial district in which the action is triable or in a county adjoining that in which it is triable. Where notice is not required to be given, then the application is not within the terms of the restraint created by this section, and it may be made elsewhere. The jurisdiction in such a case is necessarily of a gen-

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eral character, and not restricted to the district in which the court may be held. (*Erisman* agt. *Pidcock*, ante, 327.)

42. Section 780 — Under this section of the Code of Civil Procedure a county judge cannot make an order, requiring a party to show cause why an application should not be granted, which is returnable in less than eight days at a special term of the supreme court. An order shortening the term of service can only be made by the court before which the order is returnable or a judge thereof. (*Larkin* agt. *Steele*, 25 *Hun*, 254.)

43. Section 791 — Notwithstanding the provision of this section of the Code of Civil Procedure giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, &c. (*Taylor* agt. *Wing*, 83 *N. Y.*, 527.)

44. Section 791 — To give a cause a preference under this section of the Code of Civil Procedure (*sub. 5*), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. (*Peyser* agt. *Wendt*, 84 *N. Y.*, 642.)

45. Sections 791, 793 — Where the right to a preference does not appear in the pleadings, the order giving the preference should be obtained *before* notice of trial, and should be served either *before* or *with* the notice.

Where a plaintiff first notices the cause for trial, without having obtained the preliminary order as required, he waives his right to a preference. (*Robertson* agt. *Shellhuus et al.*, ante, 489.)

46. Sections 791, 793 — Where the right to a preference depends upon

facts which do not appear upon the pleadings, a copy of the order granting the preference must be served with or before the notice of trial or argument.

By serving a notice of trial before making a motion to have the cause preferred, the right to such preference is waived. (*City National Bank of Dallas* agt. *National Park Bank*, ante, 495.)

47. Section 803 — The plaintiffs obtained an order for discovery upon a petition alleging upon information and belief, that defendants had in their possession certain letters and bills of lading relating to the goods mentioned in the complaint, and books of account containing entries relating to them, and that said books and papers related to the merits of the action, and their inspection was necessary to prepare the case for trial:

Held, 1. That the possession by defendants of these books and papers, in the absence of denial by them, must be assumed; that if they exist, they would necessarily relate to the merits of the action, and that, therefore, a case is made out for a discovery, under this section of the Code.

2. The defendants' claim that no discovery can be ordered, except in the cases mentioned in rule 14 of the supreme court rules is untenable, as by the provisions of section 804 to 808 of the Code, the general rules of practice may enlarge section 803 and the following sections, but they have no power to restrict the operations of those sections. (*Amsinck* agt. *North*, ante, 115.)

48. Section 829 — Where a plaintiff, suing as executor, proves by a third person a conversation between his testator and the defendant, it is competent for the defendant to state whether the conversation testified to ever took place. (*Gorham* agt. *Price*, 25 *Hun*, 11.)

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49. Section 832—The Code of Civil Procedure was intended to apply only to civil actions and proceedings, except where otherwise provided; and this section, declaring "a person who has been convicted of crime or misdemeanor" to be, notwithstanding, a competent witness, before the amendment of 1879 making such convict "a competent witness in a civil or criminal action or special proceedings," did not remove the statutory disqualification as a witness of a person convicted and sentenced for a felony.

Though the record is the best evidence of a conviction, yet although no foundation has been laid for secondary evidence, if without objection from either witness or party the fact of such conviction is proved by parol, and is not disputed, it cannot be disregarded. (*Perry* agt. *The People*, ante, 148.)

50. Section 921—*It seems* that the certificate of a clerk of the proper county as to the non-filing of the certificate that the whole capital stock of a corporation has been paid in is defective where it omits to state that diligent search for it has been made in his office as required by this section. (*Briggs et al.* agt. *Waldron*, 83 N. Y., 582).

51. Sections 983, 987—As an action under the manufacturing act (*sec. 15, chap. 40, Laws of 1848*), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (*Code of Civil Procedure, sec. 983*) and must be tried in the county where the cause of action or some part thereof arose.

As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the

company may have originated in another.

The right of the defendant in such an action to have the place of trial changed to the proper county, where the venue is laid in another, is an absolute one, and his motion to secure that right cannot be defeated by proof showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial as stated in the complaint.

It seems, that the proper practice in such case is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (*sec. 987*) he must make his motion. (*Veeder* agt. *Baker*, 83 N. Y., 156.)

52. Section 997—When after judgment was entered an appeal was at once taken, a case made and served and amendments proposed and noticed for settlement, the appellant took no further steps to have the case settled for over three years:

Held, that a motion to then settle the case was properly denied for laches, notwithstanding the judge before whom the case was tried was never afterward able to administer his judicial functions.

Held, further, that although the appellant may not have his case settled by a judge, he may file the case and exceptions which have been settled by lapse of time. (*Ingersoll* agt. *Smith*, ante, 474.)

53. Section 997—Where findings contained in the case, as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. (*Schwinger* agt. *Raymond et al.*, 83 N. Y., 192.)

54. Section 999—The entry of a final order granting a motion for a new trial on the minutes does not prevent the judge upon the same

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papers from listening to a rehearing on application of the defeated party, and making an order vacating the former final order, and deciding the motion the other way by denying it. (*Herzig* agt. *Metzger*, ante, 355.)

55. Sections 1000-1005 — An order sending the exceptions to the general term to be heard in the first instance does not suspend the entry of judgment, unless the order as entered also provides for the suspension of judgment upon the verdict.

The motion to be made in the general term is for a new trial on the exceptions, and all that court has power to do is to grant or refuse the motion. (*Douglass* agt. *Haberstro*, ante, 29.)

56. Section 1000 — Where an action tried at a circuit, before the court and a jury, a nonsuit has been granted, the court cannot, since the passage of the Code of Civil Procedure, order the exceptions to be heard in the first instance at the general term. (*Seely* agt. *N. Y. C. and H. R. R. Co.*, 25 *Hun*, 281.)

57. Section 1019 — A referee is not bound to part with his report without payment of his legal fees, and when he has his report ready within the statutory time and offers to deliver it on payment of such fees, the offer will be deemed a sufficient delivery to prevent a forfeiture of fees declared by this section of the Code of Civil Procedure. (*Geib* agt. *Topping*, 83 *N. Y.*, 46.)

58. Section 1013 — The provision of this section of the Code of Civil Procedure, fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of Rule 32 as it

stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. (*Gormley* agt. *McGlynn et al.*, 84 *N. Y.*, 284.)

59. Section 1207 — Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue." (*Stevens* agt. *Mayor, etc.*, of *City of New York*, 84 *N. Y.*, 296.)

60. Section 1337 — It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1867 (chap. 361, Laws of 1867), to move for a dissolution of the order for his appearance and examination on the ground that was improvidently granted.

Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the question was not reviewable here. (*Bassett* agt. *Wheeler*, 84 *N. Y.*, 466.)

61. Section 1340 — Where an appeal lies under. (*Warner* agt. *Henderson*, 25 *Hun*, 303.)

62. Section 1366 — An execution is valid without any teste. (*People ex rel. Brown* agt. *Van Hoesen*, ante, 76.)

63. Section 1487 — Where, in an action to recover money received, an order of arrest was granted

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against the two defendants, who were copartners, upon facts extrinsic to the cause of action set up in the complaint, and such order of arrest was executed against one defendant, and judgment was afterwards entered against the defendants and execution issued against the property of both, and then the execution against the person of the defendant against whom the order of arrest was executed was issued:

Held, that such execution against the person was valid, notwithstanding the order of arrest was not executed as against both the defendants, and the execution issued did not run against both the defendants. (*Whitman* agt. *James*, ante, 132.)

64. Section 1778 — An ordinary life insurance policy is not an instrument "for the absolute payment of money upon demand, or at a particular time" within the meaning of this section of the Code of Civil Procedure, providing that, in an action against a domestic or foreign corporation, upon such an instrument, the defendant must serve with his answer a copy of an order of a judge directing that the issues presented by the pleadings be tried. (*McKee* agt. *Metro-politan Life Insurance Co.*, 25 *Hun*, 583.)

65. Section 1780 — Where a suit is brought against a foreign corporation, though a general appearance by defendant before answering gives the court jurisdiction over its person, it does not necessarily give jurisdiction over the subject-matter of the action, and where some of the plaintiffs are non-residents, the complaint must be dismissed as to them, a case not being made out under this section of the Code of Civil Procedure. (*Ervin and others* agt. *The Oregon Railway and Navigation Company*, ante, 490.)

66. Section 1919 — Under this sec-

tion, an action may be maintained by a member of a benevolent society against the treasurer of such society to recover from the funds of the same certain moneys alleged to be due him by reason of sickness. (*Poultney* agt. *Bachman*, ante, 466.)

67. Section 1919 — When an unincorporated association, consisting of more than seven members, has been formed, and has adopted by-laws and elected a treasurer, an action cannot be maintained against the individual members thereof upon a debt due from the association, unless an action has first been brought against its president or treasurer, as prescribed by this section of the Code of Civil Procedure. (*Flagg* agt. *Swift*, 25 *Hun*, 623.)

68. Section 2138 — Requiring the hearing on *certiorari* to be on the writ, the return and the papers on which the writ was granted does not allow the return to be overthrown by the statements contained in such papers. Such papers only establish facts as to which the return is silent. (*People ex rel. McCarthy* agt. *French*, 25 *Hun*, 111.)

69. Section 2260 — A judgment of a county court affirming a final order or judgment of a justice of the peace in summary proceedings, is appealable to the general term. (*Warner* agt. *Henderson*, 25 *Hun*, 303.)

70. Section 2434 — This section of the Code of Civil Procedure confers power to institute supplementary proceedings before a judge of the supreme court in the city of New York in an action in which an execution has issued out of that court. (*Baldwin* agt. *Perry*, 25 *Hun*, 72.)

71. Sections 2706-2714 — In the proceedings authorized by these sections of the Code of Civil Pro-

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cedure for the discovery of property of a decedent, wrongfully withheld from his legal representatives, the question of possession only and not that of title can be examined, and the said sections are not in conflict with the provisions of the constitution declaring that no person shall be deprived of life, liberty or property without due process of law, and that trial by jury in all cases in which he has been heretofore used shall remain inviolate. (*Matter of Curry*, 25 Hun, 321.)

- 72 Section 2798 — The words "within four years before the sale," in relation to the payment into the proper surrogate's court of surplus moneys arising on sale of real estate, relate to the date of the sale and not to the commencement of the action or proceeding resulting in the sale. (*White agt. Poillon*, 25 Hun, 69.)

73. Sections 2870-2874 — In proceedings before a justice of the peace to procure the commitment of one alleged to have been guilty of a criminal contempt, as provided by these sections of the Code of Civil Procedure, the party accused is entitled to be sworn and to testify in his own behalf, and to have the testimony of witnesses produced by him taken, and a refusal of the justice to receive such testimony will render the commitment void. (*People ex rel. Schlosser agt. Porter*, 25 Hun, 601.)

74. Section 3046 — Where a notice of appeal from the judgment of a justices' court was dated June 17, 1881, was signed "C. E. Howe, appellant's attorney," and was served with an undertaking in due form to stay execution, signed and acknowledged by the appellant in person:

Held, that was sufficient.

The notice of appeal is a mandate of the county court, is properly entitled therein, and governed

by the same general principles as other proceedings in a court of record. A party may sign it as attorney in person, adding office address or place of business, residence or other place where papers may be served upon him as required by Rule 2, general rules of practice, or by an *attorney-at-law*, and cannot be signed by an *attorney in fact* or an agent as such. (*Bishop agt. Van Vechten*, ante, 261.)

75. Section 3228 — The costs awarded by this section of the Code of Civil Procedure, apply only to actions in certain of the courts of record. (*Combs agt. Combs*, ante, 304.)

76. Sections 3228, 3229, 3245, 3248 — In an action against a municipal corporation, a plaintiff demanding judgment for a sum of money only, who fails to present his claim for payment to the chief fiscal officer (*i. e.*, the treasurer) of such corporation before the commencement of the action, cannot, under section 3245 of the Code of Civil Procedure, be awarded costs, although he recover a verdict against the corporation. It is no answer to this requirement that the chief fiscal officer is not authorized to adjust and pay the claim on presentation.

When the plaintiff fails to so present his claim, and recovers the sum of fifty dollars or more, the defendant does not, by reason of the plaintiff's not being entitled to costs, become entitled thereto; that the plaintiff is not entitled to costs under such circumstances is not a case specified in section 3228 of the Code of Civil Procedure, and the defendant is, therefore, not entitled to costs under section 3229.

A plaintiff who recovers a judgment against a municipal corporation for more than fifty dollars, should not be subjected to the payment of costs, as a penalty for non-presentation of his claim, in addition to being deprived of the

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right to costs given in other cases.

The certificate to entitle a party to costs, &c., provided for by section 3248 of the Code of Civil Procedure, is of some fact appearing on the trial, and has no application to facts extrinsic to the action, and which have no connection with the issue.

The non-presentation of a claim against a municipal corporation to its chief fiscal officer, is not a defense to the action, and not a fact involved in the trial; and the certificate referred to in section 3248 is not required as to the fact of non-presentation. (*Baine* agt. *City of Rochester*, ante, 346.)

77. Section 3238 — As section 3228 has reference to actions in certain courts of record only, and as by subdivision 2 of this section, in every other case upon appeal from a final judgment, the costs are in the discretion of that court, it follows that on an appeal from a justice's judgment to the general term of the supreme court, the costs are in the discretion of the court, and cannot be taxed unless awarded (*See Clark* agt. *Carroll*, 61 *How.*, 47). (*Combs* agt. *Combs*, ante, 304.)

78. Section 3240 — Where in a proceeding under the general assignment act by a creditor to establish claims as a general and preferred creditor, which have been disallowed by the assignee, the creditor prevails on a reference, the referee reporting to the court that the claims are valid claims and established, and that they should be paid by the assignee out of the assigned estate, and the court at special term, on motion, confirms such report of the referee, with costs and disbursements:

Held, the same costs and disbursements are allowed as to a successful plaintiff in an action, by the Code of Civil Procedure, with five per cent allowance upon

the amount reported due, with ten dollars costs of motion to be paid by the assignee out of the assigned estate. (*Matter of Schaller*, ante, 40.)

79. Section 3245 — Costs — who is "the chief fiscal officer of the corporation" within the meaning of this section. (*Williams* agt. *The City of Buffalo*, 25 *Hun*, 301.)

80. Section 3246 — Where a volunteer impugns the acts of sworn officials, and brings actions in their names, founded upon an allegation of their neglect of official duty, he assumes the responsibility of costs, which under this section may be awarded against him personally. (*Commissioners of Public Charities and Corrections* agt. *Casiatir*, ante, 113.)

81. Sections 3247-3250 — On an appeal from a district court judgment to the court of common pleas, no undertaking or deposit is required to perfect the appeal. The payment of the costs of the action only is required by section 3047 of the Code of Civil Procedure.

By section 3050 no undertaking is required unless a stay of execution is desired. (*Struve* agt. *Droge*, ante, 258.)

82. Section 3251 — After the proofs are closed, and the case is finally submitted to a court, referee or a jury, the trial is completed and finished.

Where the trial was commenced during the afternoon of November twenty-eighth, and the proofs were closed, and the cause fully submitted to the jury, and they retired to consider their verdict about 5 P. M. of the twenty-ninth, and returned into court with a verdict about 10 o'clock A. M. of the thirtieth:

Held, that the trial did not occupy more than two days within the meaning of subdivision 3 of

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this section of the Code of Civil Procedure, allowing ten dollars extra costs when the trial necessarily occupies more than two days. (*Washburne* agt. *Oliver*, ante, 482.)

83. Section 3258 — Double costs — Actions commenced in the justice's court, and brought into the county or supreme court, are within this section of the Code. (*Porter* agt. *Cobb*, 25 *Hun*, 184.)

84. Section 3271 — A volunteer who impugns the acts of sworn officials, and brings actions in their names, founded upon an allegation of their neglect of official duty, may under the express provisions of this section be required to give security for costs. (*Commissioners of Public Charities and Corrections* agt. *Casiatir*, ante, 113.)

85. Sections 3284, 310 — Under these sections of the Code of Civil Procedure the clerk of the city court of Brooklyn is not entitled to retain to his own use any of the fees received by or the fines paid to him, but must account therefor and pay the same into the county treasury. (*Matter of Fees of Clerk of City Court of Brooklyn*, 25 *Hun*, 593.)

86. Section 3253 — In cases concededly difficult and extraordinary, this section of the Code of Civil Procedure will authorize an extra allowance to the plaintiff not only upon the sum recovered in the action, but upon the basis of the defendant's counter-claim determined against him. (*Woonsocket Rubber Company* agt. *Rubber Clothing Company*, ante, 180.)

CODE OF CRIMINAL PROCEDURE.

1. Section 903 — A special local statute is not repealed by a general statute, unless the intent to repeal is manifest, although the terms of the general act would, but

for the special law, include the cases provided for by the latter.

Chapter 152 of the Laws of 1844, which establishes the Albany penitentiary, and chapter 183 of the Laws of 1847, amendatory thereto, and which require a person convicted before one of the justices of the peace in and for the city and county of Albany of being a disorderly person and sentenced to hard labor, to be sent to such penitentiary, are still in force and unrepealed by the Code of Criminal Procedure.

Therefore, notwithstanding the provisions of this section of the Code of Criminal Procedure, a person convicted before and by one of the police justices of the city of Albany of being a disorderly person, may be sentenced to imprisonment in the Albany penitentiary at hard labor instead of being committed to the Albany county jail. (*Matter of Wachter*, ante, 352.)

2. Sections 892, 903 — The confinement of disorderly persons and vagrants in the Albany county penitentiary is proper and lawful, notwithstanding the provisions of these sections of the Code of Criminal Procedure.

Chapter 183 of the Laws of 1847 is not repealed by the provisions of these sections, but remain in full force and validity (*See Matter of Wachter*, ante, 352). (*The People* agt. *Coffee*, ante, 445.)

COHOES (CITY OF).

1. The prisoner is detained under a commitment signed "Charles F. Doyle, recorder of the city of Cohoes," which recites that "at a court of special sessions" held the 22d day of April, 1881, by him as recorder of the city of Cohoes, the said Coughlin was duly convicted of having unlawfully assaulted and beaten one John Murphy of said city of Cohoes on the 17th day of April, 1881,

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on which conviction it was adjudged that Coughlin should be imprisoned in the Albany Penitentiary at hard labor for the term of one year, and that he should also pay a fine of \$250, in default of which he should be further imprisoned one day for every dollar of such fine which was not paid:

Held, that under chapter 456 of the Laws of 1880, which amends chapter 440 of the Laws of 1876, the sentence was not in excess of the power of the recorder to impose (*See, also, In the Matter of Bayard, 61 How., 294, the decision in which is held to be correct, and to be also sustained by section 1 of article 14 of the Constitution of the U. S.*) (*Matter of Coughlin, ante, 34.*)

2. The prisoner was convicted "with having, on the 17th day of April, 1881, at the city of Cohoes, in said" (Albany) "county, together with Edward Freely, been guilty of noisy, loud and tumultuous conduct, to the disturbance of the public peace and quiet and of the people, and of having used loud, abusive, vulgar and quarrelsome language, and was fighting and quarreling to the like disturbance of the public peace and of the people," and upon such conviction was sentenced to an imprisonment of 359 days:

Held, that by chapter 456 of the Laws of 1880, amending chapter 440 of the Laws of 1876, the recorder of the city of Cohoes had the power to condemn the prisoner to the terms of imprisonment to which he was sentenced. (*Matter of Trimble, ante, 61.*)

3. The punishment of the offense of which the prisoner was convicted is not specially prescribed by the general law of the state. It is one against the public peace not amounting to a felony, and is, therefore, a misdemeanor at common law and by the Revised Statutes, and as no special punish-

ment is provided, is punishable by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment (*See also Matter of Bayard, 61 How., 294, and Matter of Owen Coughlin, ante, 34.*) (*Id.*)

COMMISSIONS.

See BROKER.

Harper agt. Goodall, ante, 288.

COMMISSION (TO TAKE TESTIMONY).

1. The power of the court to award a commission without the consent of parties to take the testimony of a witness out of the State depends entirely on statute, and can only be exercised in the cases therein specified. (*In re an Attorney, 83 N. Y., 164.*)
2. The provisions of the Code of Civil Procedure in reference to taking depositions out of the State (*secs. 887 et seq.*) relate to actions only. (*Id.*)
3. In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination. (*Id.*)
4. Accordingly, *held*, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder." (*Id.*)

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COMPLAINT.

1. An allegation in a complaint that B. died seized of lands, intestate, unmarried and without issue, leaving him surviving a *father*, an alien, who died intestate and without living descendants, whereby the land escheated, is not, *on demurrer*, a sufficient allegation to make it affirmatively appear that the father died without heirs having legal capacity to take. (*Bradley* agt. *Dwight*, ante, 300.)
2. It is the settled law of this state that descent between brother and sister is *immediate*, notwithstanding the *alienage* of the parent, and, therefore, the allegation in the complaint that the lands escheated was an unauthorized conclusion. (*Id.*)

See EXCISE LAW.

Hess agt. *Appell*, ante, 313.

See ACTION.

Bates et al. agt. *Plonsky et al.*, ante, 429.

CONDITIONAL SALE.

See DEED.

Coburn agt. *Anderson*, ante, 268.

CONSTABLE.

1. A bond given by a constable in the form required by section 21 of 2 Revised Statutes, 346, before it was amended by chapter 788 of 1872, and conditioned for the payment of all such sums of money as the constable might become liable to pay on account of any execution which should be delivered to him for collection, covers a wrongful levy made by him under an execution, against the property of a person other than the judgment debtor, and the sureties upon the bond are liable for the damages thereby occasioned.

(*People ex rel. Comstock* agt. *Lucas*, 25 *Hun*, 610.)

CONFLICT OF LAWS.

1. Where coupons of railroad bonds, which had been stolen in this country, were purchased after maturity in Frankfort-on-the-Main, and sent here for collection, and this action was brought by plaintiff, who owned the coupons at the time they were stolen, to restrain payment to the purchasers by the railroad company:

Held, that under the law of this state, though there is nothing to impeach the good faith of the purchasers, that transaction, the coupons being over due, cannot avail to invest them with a title without the assent of the plaintiff, the true owner, from whom they were stolen; and her title to the coupons is unaffected by such purchase. The law and usage prevailing at Frankfort being in conflict with the law of New York upon this subject, the latter must prevail, the plaintiff and one of defendants being residents of New York, and the property itself, the subject of the action, being brought within this jurisdiction. (*Wylie* agt. *Speyer*, ante, 107.)

CONSTITUTIONAL LAW.

See COUNTY COURTS.

Lenhard agt. *Lynch*, ante, 56.

CONTEMPT.

1. In March, 1881, a judgment was entered in the city court of Brooklyn in favor of one Lanfahrt, against Peter and Eva Fries, as trustees, for the sum of \$688.67, which judgment ordered and commanded the said Peter and Eva as trustees to pay the said sum to the plaintiff or her attorney upon demand. Thereafter, upon

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proof of a failure to pay the said sum upon demand, an order was made adjudging the said defendants guilty of a contempt, imposing a fine upon them and committing them to the county jail until it was paid.

Upon an application made by the relator, Peter, for his release upon a writ of *habeas corpus*:

Held, that the contempt intended to be charged did not fall within the definition of a criminal contempt.

That the judgment being one for the recovery of money only, and enforceable by execution, the order and command to pay the same was unlawfully inserted therein.

That the relator was entitled to be discharged. (*People ex rel. Fries* agt. *Riley*, 25 *Hun*, 587.)

2. In proceedings before a justice of the peace to procure the commitment of one alleged to have been guilty of a criminal contempt, as provided by sections 2870 to 2874 of the Code of Civil Procedure, the party accused is entitled to be sworn and to testify in his own behalf, and to have the testimony of witnesses produced by him taken, and a refusal of the justice to receive such testimony will render the commitment void. (*People ex rel. Schlosser* agt. *Porter*, 25 *Hun*, 601.)

CONTRACT.

1. The plaintiff, a resident of Philadelphia and a publisher of books at that place, under a firm name of "J. M. Stoddart & Co.," but having in fact no partner, entered into a contract under the name of "J. M. Stoddart & Co." with the defendant Key, at the city of Philadelphia, in respect to the canvassing for and selling by Key of the American reprint, of the "Encyclopædia Britannica," in the states of New York and New Jersey. Key was to report to Stoddart

at Philadelphia, from which place all the supplies were to be ordered and forwarded:

Held, in an action brought in this state in favor of Stoddart against Key and others, founded upon the contract, that the contract was not void, under the statutes of New York, which forbids the carrying on of business by an individual in a firm name, or the use of the words "& Co.," when it represents no actual partner (*Laws of N. Y.*, 1833, chap. 281). As a general rule the law of the state, when contracts purely personal are made, must govern as to their construction and validity, unless made in reference to the laws of another state in which they are to be performed (*Stoddard* agt. *Key*, *ante*, 137.)

2. Where a savings bank opened an account "with John O'Keefe or Ellen Mulcahey, creditor:"

Held, that the contract means that the money may be paid to either as in the case of a joint deposit. But if one of said persons die the money cannot be paid to his legal representatives but must be paid to the survivor. The reasons stated. (*Mulcahey* agt. *Emigrant Industrial Savings Bank*, *ante*, 463.)

CONVERSION.

See TENANTS IN COMMON.

Potter agt. *Neal*, *ante*, 158.

CORPORATIONS.

1. The statute as to the liability of a trustee of a corporation for the debts of the same on their failure to make and file its annual report (*Laws of 1848*, chap. 40) is a penal one, and must be strictly construed. (*Vernon* agt. *Palmer*, *ante*, 425.)
2. To charge a trustee with liability under this statute three things are

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necessary: A debt which is due and payable from the corporation, a default in the filing of the annual report, and a trusteeship on the part of the party to be charged. (*Id.*)

3. Defendant was elected a trustee of a manufacturing corporation for the year ending August 6, 1878, accepted the office, and there never was a subsequent election of trustees. In January, 1878, it failed to file its annual report, and a receiver of the corporation was appointed November 9, 1878. The corporation gave to the plaintiffs its promissory note for \$979.07, due August 10, 1878, and the plaintiffs sold and delivered to the company certain goods in June, July and August, 1878, on an agreed credit of four months after delivery, which thus became due in October, November and December, 1878. In an action under the manufacturing act (*sec. 12, chap. 40, Laws of 1848*) to recover for the same, because of the failure to file its annual report:

Held, that the complaint should be dismissed. Although the goods were sold at a time when the defendant was a trustee, they were sold on a credit which did not expire until after the defendant ceased to be a trustee. (*Id.*)

4. A debt within this statute is not contracted until there is an obligation giving a present right of action against the corporation. If there be no such obligation nor debt or duty which may be presently demanded from the corporation, there is no debt or duty which can be demanded under the statute as a penalty against the trustee. (*Id.*)

COSTS.

1. The court will not compel a party who has himself noticed a case for trial but for some reason does not move it, to pay costs to another

party who has not put himself in the same position. By noticing a case he keeps for himself control of it at the circuit. (*Seifert* agt. *Schillner*, *ante*, 97.)

2. If the plaintiff does not move after he has brought the defendant into court, he may be punished by a motion, under the Code, to dismiss the case for want of prosecution. But no similar remedy is given to the plaintiff where the defendant, having noticed the case for trial, does not move it when the case is reached upon the calendar. (*Id.*)
3. Where the commissioners of charities and corrections of the city of New York, as overseers of the poor, bring a suit in the exercise of their powers, it is under the sanction of their oath of office, and every presumption of good faith attends the proceeding, and hence they are in such cases exempt from costs. (*Commissioners of Public Charities and Corrections* agt. *Casiatir*, *ante*, 113.)
4. But where a volunteer impugns the acts of sworn officials and brings actions in their names, founded upon an allegation of their neglect of official duty, he assumes the responsibility of costs, which under section 3246 of the Code of Civil Procedure may be awarded against him personally; and under the express provisions of section 3211 he may be required to give security for costs. (*Id.*)
5. Where the costs are in the discretion of the court, they are not recoverable unless specially awarded, and when none are awarded the party must establish that he is entitled to them as of right on the affirmance, or he cannot recover them. (*Combs* agt. *Combs*, *ante*, 304.)
6. Where the defendant carried an appeal from the judgment of a

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justice's court to the general term of the supreme court, and the judgment was there affirmed, the entry of the decision being simply "judgment affirmed," without any direction as to costs:

Held, that the plaintiff was not entitled, of course, to costs upon appeal, and that the costs being in the discretion of the court, and not having been awarded to the plaintiff, they could not be taxed. (*Id.*)

7. The costs awarded by section 3228 of the Code of Civil Procedure, apply only to actions in certain of the courts of record. (*Id.*)

8. As section 3228 has reference to actions in certain courts of record only, and as by subdivision 2 of section 32 8, in every other case upon appeal from a final judgment, the costs are in the discretion of that court, it follows that on an appeal from a justice's judgment to the general term of the supreme court, the costs are in the discretion of the court, and cannot be taxed unless awarded (*See Clark* agt. *Carroll*, 61 *How.*, 47). (*Id.*)

9. In an action against a municipal corporation, a plaintiff demanding judgment for a sum of money only, who fails to present his claim for payment to the chief fiscal officer (*i. e.*, the treasurer) of such corporation before the commencement of the action, cannot, under section 3245 of the Code of Civil Procedure, be awarded costs although he recover a verdict against the corporation. It is no answer to this requirement that the chief fiscal officer is not authorized to adjust and pay the claim on presentation. (*Baine* agt. *City of Brooklyn*, *ante*, 346.)

10. When the plaintiff fails to so present his claim, and recovers the sum of fifty dollars or more, the defendant does not, by reason of the plaintiff's not being entitled

to costs, become entitled thereto; that the plaintiff is not entitled to costs under such circumstances is not a case specified in section 3228 of the Code of Civil Procedure, and the defendant is, therefore, not entitled to costs under section 3229. (*Id.*)

11. A plaintiff who recovers a judgment against a municipal corporation for more than fifty dollars, should not be subjected to the payment of costs, as a penalty for non-presentation of his claim, in addition to being deprived of the right to costs given in other cases. (*Id.*)

12. The certificate to entitle a party to costs, &c., provided for by section 3248 of the Code of Civil Procedure, is of some fact appearing on the trial, and has no application to facts extrinsic to the action, and which have no connection with the issue. (*Id.*)

13. The non-presentation of a claim against a municipal corporation to its chief fiscal officer, is not a defense to the action, and not a fact involved in the trial; and the certificate referred to in section 3248 is not required as to the fact of non-presentation. (*Id.*)

14. Under the Code of Civil Procedure in an action in which the defendant is liable to arrest, and in which the plaintiff is unsuccessful in his suit, the latter may be arrested and imprisoned by the defendant's attorney on a claim for costs. (*Parker* agt. *Spear*, *ante*, 394.)

15. And this is true, although the plaintiff did not exercise his right to arrest the defendant, and although he may have a perfectly good case, but loses his suit on a mere technicality. (*Id.*)

16. Where the general term in March, 1878, reversed the judgment which had previously been

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rendered for plaintiff "with costs to the defendant to abide the event," and the court at special term on June 4, 1878, while the issues were pending to be retried, granted to the defendants leave to amend the answer upon payment "of the costs of the action to the present time, not including allowances:"

Held, that this language did not expressly nor by necessary implication deprive the defendants of their contingent right to the costs awarded by the general term order, which contemplated not a final and complete disposition of all costs that had accrued up to that time as such, but a compensation to the plaintiffs for the amendment, to be measured by the taxable costs, to which, if successful, they would have been entitled. (*Havemeyer et al.* agt. *Havemeyer et al.*, ante, 476.)

17. After the proofs are closed, and the case is finally submitted to a court, referee or a jury, the trial is completed and finished. (*Washburne* agt. *Oliver*, ante, 482.)

18. Where the trial was commenced during the afternoon of November twenty-eighth, and the proofs were closed, and the cause fully submitted to the jury, and they retired to consider their verdict about 5 P. M. of the twenty-ninth, and returned into court with a verdict about 10 o'clock A. M. of the thirtieth:

Held, that the trial did not occupy more than two days within the meaning of subdivision 3 of section 3251 of the Code of Civil Procedure, allowing ten dollars extra costs when the trial necessarily occupies more than two days. (*Id.*)

19. Where a party gives notice of trial, and then fails to try the cause pursuant to his notice or to countermand it in due season, he will be compelled to pay the opposite party who has omitted to notice

the cause, but attends in obedience to the call of the party noticing, the costs of the term (*Reversing S. C.*, 62 *How.*, ante. *Following*, *Potter* agt. *Lewis*, 18 *Wend.*, 516, n.; *Townsend* agt. *Cowen*, 19 *Wend.*, 639; 2 *Strange*, 797; 1 *Term Rep.*, 696). (*Seifert* agt. *Schillner*, ante, 496.)

20. In this action for a trespass upon the plaintiff's land the defendant set up, as one of her defenses, that the land was owned by her lessor, who was entitled to the possession thereof, and that the acts constituting the alleged trespass were done by his direction. The lessor, without having caused himself to be made a party to the action, conducted the defense unsuccessfully in the name of his tenant, but on his own account:

Held, that he was liable for the costs of the action, if they could not be collected from the defendant.

Held, further, that the only legal evidence of the inability of the plaintiff to collect the costs from the defendant was the return unsatisfied of an execution issued upon the judgment. (*Perrigo* agt. *Dowdall*, 25 *Hun.*, 234.)

21. A plaintiff recovered a judgment in a justice's court and the defendant appealed, stating in his notice of appeal, as the ground thereof, "that the judgment should have been in favor of the defendant and against the plaintiff for costs." No offer was made by the plaintiff, and upon the trial the judgment was reduced forty dollars:

Held, that the Code did not require the appellant to state in his notice of appeal the exact amount of the error in the judgment, and that he was entitled to recover his costs. (*Chamberlain* agt. *Chamberlain*, 25 *Hun.*, 199.)

22. In an action brought against the indorser and makers of a promissory note, the latter, having omit-

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ted to answer, the plaintiff caused the entry of an order by the clerk severing the action, and entered a judgment against the makers. Subsequently the makers were allowed to answer, the judgment to stand as security until the final determination of the action. Thereafter both the makers and the indorser withdrew, by stipulation, their answers, and a judgment was entered against them:

Held, that the plaintiff could tax but one bill of costs. (*Levin* agt. *Haas*, 25 *Hun*, 266.)

25. Where a judgment in favor of the plaintiff, for so small an amount as to entitle the defendant to costs, is reversed on appeal, costs to abide the event, and a new trial is granted on which the plaintiff obtains a judgment sufficient to entitle him to costs, he is entitled to costs as well of the first trial as of the appeal and the new trial. (*Carpenter* agt. *Manhattan Life Ass. Co.*, 25 *Hun*, 194.)

24. The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for a payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each:

Held, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of the Code of Civil Procedure in reference thereto (*sec.* 309), as there was no "recovery," or "claim" for the

payment of any fixed sum, and "the subject-matter involved" was plaintiffs' interest when ascertained, which proved to be nothing. (*Weaver* agt. *Ely*, 83 *N. Y.*, 89.)

25. An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached. (*See Wehle* agt. *Conner*, 83 *N. Y.*, 231.)

26. Under the provision of the act of 1867 (*sec.* 8, *chap.* 782, *Laws* of 1867) in relation to surrogates' courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts. (*Dunford* agt. *Weaver*, 84 *N. Y.*, 445.)

27. Where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. (*First National Bk. of M.* agt. *Fourth National Bk.*, 84 *N. Y.*, 469.)

28. Where, in an equity action, the defendants answered separately and a judgment in their favor was affirmed in this court with costs "to the respondents," *held*, that this authorized but one bill of costs. (*Van Gelder* agt. *Van Gelder*, 84 *N. Y.*, 658.)

29. The allowance of costs in the supreme court in such an action, and whether to one or more respondents, is in the discretion of the court below, and its decision is not reviewable here. (*Id.*)

30. Upon reversal on appeal on the law to general term from decree

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of surrogate of county of New York, establishing lost or destroyed will, it is proper to remit proceedings to surrogate, and costs should be awarded against respondent. (*See Sheridan agt. Houghton* [Mem.], 84 N. Y., 643.)

COUNSEL.

1. Where a counsel, employed by the attorney of defendant to argue a demurrer to the complaint, omitted to appear when the case was called, such employment did not authorize him to make a verbal stipulation, for the purpose of procuring assent to the opening of his default, that the decision upon the demurrer should be final in the case; and even were the stipulation within the terms of the counsel's authority, the defendant should be allowed on terms, upon a proper case shown, to serve his answer. (*Baron agt. Cohn, ante*, 367.)

COUNTER-CLAIM.

See ANSWER.

Perry agt. Foster, ante, 228.

See REPLY.

Adams agt. Roberts, ante, 253.

1. In an action on contract to build sewers, defendant set up as a counter-claim, damages for breach of contract in not completing the work:

Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim. (*Taylor agt. the Mayor* [Mem.], 83 N. Y., 625.)

COUNTY CLERK.

1. An order having been made at a circuit putting off the trial of

the action and requiring the defendant to pay costs, the parties, upon a notice served by the plaintiff, appeared before the clerk who refused to tax the costs claimed by the plaintiff on the ground that his affidavits were defective. Thereafter the plaintiff upon new affidavits and upon notice to the defendant again applied to the clerk for a taxation of his costs:

Held, that the power of the clerk was exhausted on the first application, and that he had no power to entertain the second application without a special order of the court. (*Larkin agt. Steele*, 25 Hun, 254.)

COUNTY COURTS.

1. Chapter 480 of the Laws of 1880, which purported to increase the jurisdiction of the county courts from one to three thousand dollars, is now of no force or effect, for two reasons:

First. Because it attempted to amend a law which had been already repealed in express terms.

Second. Because it is in conflict with that provision of the constitution which, by necessary implication, limits the jurisdiction of the county courts in this class of actions to those cases "in which the damages claimed shall not exceed \$1,000" (*This is adverse to Sweet agt. Flannagan*, 61 How., 321.) (*Lenhard agt. Lynch, ante*, 56.)

2. The objection that a county court has not jurisdiction over the person of the defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits. (*Potter agt. Neal, ante*, 158.)
3. No appeal lies to the general term from an order of a county court, granting leave to issue an execution upon a judgment recovered in a justices' court, where a transcript thereof was filed and judg-

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ment thereon docketed in the clerk's office of the county in 1866. (*Kincaid* agt. *Richardson*, 25 *Hun*, 237.)

COUNTY JUDGE.

1. Under section 780 of the Code of Civil Procedure a county judge cannot make an order, requiring a party to show cause why an application should not be granted, which is returnable in less than eight days at a special term of the supreme court. An order shortening the term of service can only be made by the court before which the order is returnable or a judge thereof. (*See Larkin* agt. *Steele*, 25 *Hun*, 254.)

COURT OF APPEALS.

1. When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from an order. (*Veeder* agt. *Baker*, 83 *N. Y.*, 163.)
2. Notwithstanding the provision of the Code of Civil Procedure (*sec.* 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc. (*Taylor* agt. *Wing*, 83 *N. Y.*, 527.)
3. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. (*Briggs* agt. *Waldron*, 83 *N. Y.*, 582.)

CRIMINAL LAW.

1. Under an indictment for an assault with intent to do bodily harm with a sharp, dangerous weapon (*chap.* 74, *Laws of 1854*), a conviction can be had of an assault, but not assault and battery. (*The People* agt. *Cavanagh*, *ante*, 187.)
2. What is a sharp, dangerous weapon within the meaning of that statute, is a question of fact. (*Id.*)
3. The weapon used must be sharp as well as dangerous, and if not a knife, dirk or dagger, it must be similar to one of them, that is, one which will inflict a similar wound. (*Id.*)
4. Intoxication is no defense to crime. (*Id.*)
5. A sentence to imprisonment takes effect only from the first day of actual incarceration, and not from the day when sentence is pronounced. (*People ex rel King* agt. *McEwen*, *ante*, 226.)
6. A special local statute is not repealed by a general statute, unless the intent to repeal is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter. (*Matter of Wachter*, *ante*, 352.)
7. Chapter 152 of the Laws of 1844, which establishes the Albany penitentiary, and chapter 183 of the Laws of 1847, amendatory thereto, and which require a person convicted before one of the justices of the peace in and for the city and county of Albany of being a disorderly person and sentenced to hard labor, to be sent to such penitentiary, are still in force and unrepealed by the Code of Criminal Procedure. (*Id.*)
8. Therefore, notwithstanding the

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provisions of section 903 of the Code of Criminal Procedure, a person convicted before and by one of the police justices of the city of Albany of being a disorderly person, may be sentenced to imprisonment in the Albany penitentiary at hard labor, instead of being committed to the Albany county jail. (*Id.*)

9. On convictions for misdemeanor the sentence begins to run from the day it is pronounced, and the time the prisoner is detained in the county jail is to be credited upon the sentence. (*This seems to be adverse to People ex rel. King* agt. *McEwen*, ante, 226.) (*The People* agt. *Lincoln*, ante, 412.)

10. The confinement of disorderly persons and vagrants in the Albany county penitentiary is proper and lawful, notwithstanding the provisions of sections 892 and 903 of the Code of Criminal Procedure. (*The People* agt. *Coffee*, ante, 445.)

11. Chapter 183 of the laws of 1847 is not repealed by the provisions of these sections, but remain in full force and validity (*See Matter of Wachter*, ante, 352.) (*Id.*)

See COHOES (CITY OF).

Mutter of Coughlin, ante, 34.

Matter of Trimble, ante, 61.

See INDICTMENT.

The People agt. *Sessions*, ante, 415.

See INSANITY.

The People agt. *O'Connell*, ante, 436.

CRIMINAL TRIAL.

1. Upon the trial of an indictment for larceny it did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in

planning the theft and in learning the situation of the premises and the ways of the keeper thereof. That the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts:

Held, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. (*McCarney* agt. *People*, 83 N. Y., 408.)

2. To constitute one a principal in a felony, he must be present at its commission; his presence, however, may be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design and was so situated as to be able to give aid to his associates with a view to insure the success of the common purpose. (*Id.*)

3. The letter handed to the watchman, a decoy letter, was received in evidence:

Held, no error. (*Id.*)

4. A telegram was offered in evidence on the part of the people; the district attorney stated he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner's counsel objected that he was not then connected with it, and to the taking of it, "on the promise to strike it out." The objection was overruled:

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Held, no error; that it was a mere question as to the order of proof and within the discretion of the court. (*Id.*)

5. Also, *held*, that the omission of the court on its own motion to strike out this evidence upon failure of the prosecution to connect the prisoner with it was not error; that it was for the prisoner to ask to have the evidence, if he so desired, stricken out, or to request the court to charge the jury to disregard it, and his omission to do so was a waiver of his right. (*Id.*)

6. A witness for the prisoner was shown, on cross-examination, a copy of a telegram, and was asked if he received it. This was objected to, as having nothing to do with the trial and as immaterial. The objection was overruled. The telegram was not read or offered in evidence:

Held, no error. (*Id.*)

7. The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. (*Hope* agt. *People*, 83 N. Y., 418.)

8. It is not a proper plea, therefore, to an indictment that the grand jury received incompetent and irrelevant evidence, to wit: the *ex parte* affidavits taken before the committing magistrate. (*Id.*)

9. *It seems* that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments of proof that the affidavits were the only evidence or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence. (*Id.*)

10. Where an indictment contains several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general. (*Id.*)

11. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered:

Held, that the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 R. S., 677, sec. 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key although in the minds of the robbers at the time of the taking could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table. (*Id.*)

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12. Also, *held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. (*Id.*)

13. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. (*Id.*)

14. Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. (*Id.*)

15. Upon the trial of an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account, the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it, it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office:

Held, no error. (*People ex rel. Phelps* agt. *Oyer and Terminer*, 83 N. Y., 436.)

16. It appeared from this evidence that while the mayor did not read or examine each voucher which accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers:

Held, that this authorized the submission of the question to the

jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence although neither examined nor read by the mayor was a false pretense. (*Id.*)

17. It appeared that a duplicate of the bill was, in accordance with the custom in the municipal offices, prepared and accompanied the original bill when presented to the mayor:

Held, that this fact and that the duplicate might alone have produced the result, was immaterial, as it was but part and parcel of the false pretense for which the prisoner was responsible. (*Id.*)

18. A jury was challenged by the prisoner for principal cause and to the favor; he testified in substance that he had read in the newspapers of great frauds perpetrated against the city; that he had read of the prisoner's case and had formed in some degree an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict and that his previously formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called whom the prisoner's counsel proposed to challenge peremptorily

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upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges:

Held, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct, and the exhaustion of the peremptory challenges was not compelled by any error of the court. (*Id.*)

19. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own. (*Id.*)

20. The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. (*Id.*)

21. Where this limitation has been regarded, this court cannot interfere, save where there has been an abuse of discretion. (*Id.*)

22. Plaintiff in error was indicted under the provisions of the act "to prevent and punish wrongs to children" (*sec. 4, chap. 122, Laws of 1876*), which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food clothing and medicine, thus causing his health to be injured. It appeared, on trial, that the accused was the secretary of a benevolent institution, having a board of trustees,

and subject to visitation of the supreme court and the state board of charities and corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates:

Held, that he had the care and custody of the child within the meaning of the statute. (*Cowley agt. People*, 83 N. Y., 464.)

23. The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution. It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use:

Held, no error. (*Id.*)

24. The court charged that if the prisoner took the child into his care and custody, the law imposed upon him the duty of giving him food, clothing, care and medical attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do and life was endangered or health injured he was guilty:

Held, no error. (*Id.*)

25. One who, with no natural or legal duty voluntarily seeks and assumes the care and custody of a child is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. (*Id.*)

26. In putting hypothetical questions to expert witnesses counsel

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may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. (*Id.*)

27. The indictment charged the offense to be on a day specified; the proof was of continuous acts and omissions in giving the child insufficient food; no one specific act was shown to have been done on any given day:

Held, that the statute did not require the offense to be made out by proof of an act on any particular day; that the indictment was good averring the offense on a day specified, and proof of repeated and continuous acts or neglects connected in operation resulting in the effect condemned by the statute was sufficient to sustain the indictment. (*Id.*)

28. The prosecution offered in evidence photographs of the child, one taken before he went to the institution, and others taken about two weeks after he was taken away. It was proved that said photographs were accurate pictures as the child appeared at the times they were taken; also, that the child improved in condition after he was taken from the prisoner's custody and before the last photographs were taken. These were received under a general objection:

Held, no error. (*Id.*)

29. Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling house, after the court had charged that if the defendant kept a gambling house where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house:"

Held, no error; that the court had properly defined the offense of keeping a gambling house, and its remark clearly referred to a house of that character. (*King* agt. *People*, 83 N. Y., 587.)

30. Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those counts, and a judgment on the verdict is as to them a bar to further prosecution. (*People* agt. *Dowling*, 84 N. Y., 478.)

31. Upon a reversal of the conviction the trial and conviction are not a bar to a new trial upon the count on which the verdict of guilty was rendered; but the reversal does not disturb the verdict of acquittal upon the other counts. (*Id.*)

DEED.

1. The plaintiff, a married woman, executed without examination a trust deed with her husband to secure certain of his creditors, upon his representation that it was a conveyance, in form and substance, such as he had previously represented to her it would be, and to which she had assented, the fact, however, being that the deed included lands other than those he had proposed to convey and to which she had agreed:

Held, that the deed, in so far as it affected the dower rights of the wife in such other lands, is inoperative and void, and that her rights remained the same as though she had not executed the deed. (*Withaus* agt. *Schaack*, ante, 167.)

2. Also, that negligence is not to be imputed to the plaintiff in signing the deed without examination as to its contents, in reliance upon the representations of her husband (*See S. C.*, 57 *How. Pr.*, 310). (*Id.*)

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3. The plaintiff, who was building seven houses in Fortieth street on which defendant B. had loaned money upon mortgages, conveyed, in February, 1874, two of the houses to A., for a consideration of \$10,000, subject to three mortgages aggregating \$59,000. A. soon after took possession and completed the two houses at his own charge, and then one of the houses was sold under foreclosure of one mortgage, and B., in the end, acquired title thereto. Afterward A. sold the other house to B., who is now the owner of the entire property. The plaintiff, who had not previously claimed the property, brought this action in 1880 to have the deed of 1874 declared to be a mortgage security, asserting, thought there was no contemporaneous writing to that effect, that it was given as collateral for the loan, the houses to be sold when finished, and the \$10,000 repaid with interest. This defendant A. denied, and testified that the conveyance was absolute, with the conditional right in plaintiff to effect a sale of the houses which would completely reimburse him (A.) at any time within eight months:

Held, that the deed was not intended as a mortgage, but as representing an actual sale, and the privilege extended to plaintiff to find a purchaser for the property never having been complied with, she lost all right or interest in the property. (*Coburn agt. Anderson, ante, 268.*)

DEFENSE.

1. When it is claimed that a contract is void because made in violation of the act forbidding the use of the words "& Co.," when they do not represent an actual partner, the illegality must be set up affirmatively as a defense, and if not pleaded it cannot be urged upon the trial, when the fact ap-

pears, as a ground for dismissing the complaint (*O'Zools agt. Garvin, 1 Hun, 92.*) (*Stoddard agt. Key, ante, 137.*)

2. Intoxication is no defense to crime. (*The People agt. Cavanagh, ante, 187.*)

See INSANITY.

The People agt. O'Connell, ante, 436.

See SHERIFF.

Douglass agt. Haberstro, ante, 455.

DEMURRER.

1. A defendant who has demurred, but has not allowed his time to amend of course to pass, has a right to withdraw his demurrer and serve an answer instead, without leave of the court. (*The People agt. Whitwell, ante, 383.*)

2. In such case the answer must be regarded as an amendment of the demurrer. (*Id.*)

See IMPROPER JOINDER.

Kelley agt. Neuman, ante, 156.

See COUNSEL.

Baron agt. Cohen, ante, 367.

DEPOSITIONS.

1. The power of the court to award a commission, without the consent of parties, to take the testimony of a witness out of the state depends entirely on statute, and can only be exercised in the cases therein specified. (*In re an Attorney, 83 N. Y., 164.*)

2. The provisions of the Code of Civil Procedure in reference to taking depositions out of the state (*secs. 887 et seq.*), relate to actions only. (*Id.*)

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DISCOVERY.

1. The plaintiffs obtained an order for discovery upon a petition alleging upon information and belief that defendants had in their possession certain letters and bills of lading relating to the goods mentioned in the complaint, and books of account containing entries relating to them, and that said books and papers related to the merits of the action, and their inspection was necessary to prepare the case for trial:

Held, 1. That the possession by defendants of these books and papers, in the absence of denial by them, must be assumed; that if they exist, they would necessarily relate to the merits of the action, and that, therefore, a case is made out for a discovery, under section 803 of the Code.

2. The defendants' claim that no discovery can be ordered, except in the cases mentioned in Rule 14 of the supreme court rules, is untenable, as by the provisions of section 804 to 808 of the Code, the general rules of practice may enlarge section 803 and the following sections, but they have no power to restrict the operations of those sections. (*Amsinck* agt. *North*, ante, 114.)

DISORDERLY PERSONS.

See CRIMINAL LAW.

Matter of Wachter, ante, 352.

The People agt. *Coffee*, ante, 445.

See COHOES (CITY OF).

Matter of Trimble, ante, 61.

DISTRICT COURT.

1. On an appeal from a district court judgment to the court of common pleas no undertaking or deposit is required to perfect the appeal. The payment of the costs of the action only is required by

section 3047 of the Code of Civil Procedure. (*Struve* agt. *Droge*, ante, 258.)

2. By section 3050 no undertaking is required unless a stay of execution is desired. (*Id.*)

DIVORCE.

1. The defendant, in 1848, contracted a legal marriage with Catharine Murphy, at London, England, which still subsists. The defendant emigrated to the United States in 1849, and in 1850, at the city of Elmira, he and the plaintiff entered into a marriage contract, and afterwards cohabited as husband and wife, at that city, until 1860, when the first wife appeared at Elmira. The parties immediately separated, the plaintiff resumed and has ever since used her maiden name. The defendant conveyed all his property to the plaintiff and left the state. About 1863 the defendant returned to Elmira, and entered into a contract relating to property with the plaintiff, under her maiden name. Since the separation in 1860 the parties have not lived together as husband and wife, but both parties have resided at that city as unmarried persons. Shortly before the commencement of this action, the defendant commenced to live and cohabit with another woman. At the time of the intermarriage of the parties the plaintiff had no knowledge of the prior marriage of the defendant. The plaintiff asks for a divorce upon the ground of adultery, which the defendant resists upon the ground that the relation of husband and wife never existed between them, and asks that the contract of marriage entered into by them be declared null and void. The celebration of a marriage contract between the parties to this action, their subsequent cohabitation as husband

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and wife, and subsequent sexual intercourse between the defendant and another woman, is established. As a defense, and as a ground for a decree of nullity, the defendant established, by undisputed evidence, that at the time of the marriage he had a living wife:

Held, that the relation of husband and wife lies at the very foundation of a divorce *a vinculo*, and it must be affirmatively established before a judgment of divorce can be rendered.

Held, also, that a marriage contract entered into by a person having a husband or wife living, with a third person, is utterly void.

Held, also, that the evidence of the former marriage was competent in this case, and, it being established, is a defense to the action. When the plaintiff established the solemnization of a marriage contract between the parties, the defendant was not estopped from proving the former marriage, nor was he estopped from asserting the fact as a defense.

Held, further, that under section 501 of the Code of Civil Procedure, in an action for divorce *a vinculo*, a defendant may have affirmative relief. (*Finn* agt. *Finn*, ante, 83.)

DRUNKENNESS.

See INSANITY.

People agt. *O'Connell*, ante, 436.

EASEMENT.

1. Where, after the owner of two adjoining premises, one being an extension in the rear of the other, had established a communication between the front and rear buildings, with an entrance thereto through the front building, the two buildings were sold upon foreclosure of mortgages, the defendant purchasing the front building and the plaintiff that in

the rear, and then the defendant closed up the entrance in the hallway between the premises purchased by him and the rear building adjoining:

Held (in a suit by plaintiff for relief), that the case is not one entitling plaintiff to equitable interference. (*Schrymser* agt. *Phelps*, ante, 1.)

ELEVATED RAILROADS.

1. The supreme court has the power and it is their duty to review the report of commissioners appointed by the general term pursuant to the provisions of the rapid transit act of 1875 (*sec. 4*), upon the facts, and, after a consideration of all the circumstances, to determine the question whether private rights and interests should be yielded for the sake of the public good. (*Matter of Brooklyn Rapid Transit Company*, ante, 404.)
2. No man's property should be taken for or injuriously affected by the construction or operation of an elevated railroad, except upon the condition that compensation for all damages sustained by him thereby should be made. (*Id.*)
3. Ample protection against direct invasions of the rights of private property is afforded by the constitution. It cannot be taken for public use without compensation. (*Id.*)
4. But it seems a mooted question whether owners of property which merely abuts upon the street, and not actually taken by the railroad corporation, although injuriously affected, are protected by the constitutional provision referred to. (*Id.*)
5. The right to construct elevated railroads in streets should be made

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to depend upon their providing a suitable and sufficient indemnity to abutting owners against any damages which they may sustain thereby; or, if they may justly be deemed too onerous, then provision should be made by law for such indemnity in some other mode. Until such indemnity, in a suitable form, shall have been provided, the right to construct should be denied. (*Id.*)

ESCAPE.

1. Where an action is brought against a sheriff for an escape, he cannot set up an error in the process under which the arrest was made which renders it simply voidable not void. (*Dunford agt. Weaver*, 84 N. Y., 445.)

ESCHEAT.

1. An allegation in a complaint that B. died seized of lands, intestate, unmarried and without issue, leaving him surviving a *father*, an alien, who died intestate and without living descendants, whereby the land escheated, is not, *on demurrer*, a sufficient allegation to make it affirmatively appear that the father died without heirs having legal capacity to take. (*Bradley agt. Dwoight*, ante, 300.)
2. It is the settled law of this state that descent between brother and sister is *immediate*, notwithstanding the *alienage* of the parent, and, therefore, the allegation in the complaint that the lands escheated was an unauthorized conclusion. (*Id.*)
3. B., being seized of lands in fee, mortgaged them to C. The lands were afterwards conveyed to D., who died unmarried, intestate and without issue, leaving him surviving a father, an alien, who also died intestate without leav-

ing descendants. Afterwards, in 1843, the mortgage was foreclosed in chancery, but the state to whom it was alleged the lands had escheated were not made a party. The legislature released the property to the plaintiff, who brings suit to redeem against the holders under foreclosure, who have been in undisputed possession for thirty-eight years. No notice of the application to the legislature was given the defendants as required by Laws of 1829, chapter 259:

Held, that the plaintiff shows no ground of equitable relief. A court of equity should not lend its aid in furtherance of such a claim. (*Id.*)

ESTOPPEL.

See DIVORCE.

Finn agt. Finn, ante, 83.

EVIDENCE.

1. On a trial before a jury the question as to the admission of a memorandum book, like any memorandum resorted to, to aid or correct the memory, which, without it, would be indefinite and uncertain, is not whether it was admissible as the case stood when it was offered and received, but it may be received with reference to other evidence afterwards to be submitted. (*Dunn agt. James*, ante, 307.)
2. Where the plaintiff swears that he had a memorandum book kept by G.; that he was unable to keep it; that when money was paid him he took the book to G., who entered it; that he gave the items of money paid him to G. correctly; and the latter swears that he made the entries on the book correctly as the sums were given him:
Held, that this was a verification

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of the book as a memorandum in aid of the memory, rendering it definite and certain as to the money paid.

Held, also, that this evidence, thus made certain in its effect, is admissible.

Held, further, that where it was proved that the book was drawn off on a paper in the form of an account, and what the book contained was put upon this paper, thus making a sworn transcript of the book, and that this account was furnished to the defendant, and after he had examined it he said, "I find it pretty correct."

Held, that this evidence rendered the book competent as a memorandum, for the defendant had in substance admitted its correctness by admitting the correctness of a verified copy. (*Id.*)

3. Although the evidence of the defendant tended to a contradiction of these admissions, yet in this view the entire evidence, including the book as a verified memorandum, was proper for the consideration of the jury. (*Id.*)

4. Where, upon the close of the case, the plaintiff's counsel suggested that the accounts of the plaintiff, which was the sworn copy of the book and the memorandum used by the defendant while testifying, should be delivered to the jury; and the judge stated that if neither party objected they could be so delivered, and no objection being made, the same were handed to the jury:

Held, that this was in effect a consent that the account, which was shown to have been taken correctly from the book, might go before the jury on the occasion of their deliberations, and took away all just ground for the objections that the book was improperly admitted, if any such ground before existed. (*Id.*)

5. Although in an action for negli-

gence it is necessary for the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the injury complained of, it is not necessary that this be done by positive and direct evidence, proof of circumstances from which the inferences may fairly be drawn is sufficient. (*Jones agt. N. Y. Central and Hudson River Railroad, ante, 450.*)

6. Not only is the truth of evidence for a jury, but the legitimate and proper inferences to be drawn therefrom are also for them. (*Id.*)

7. Where the answer conceded that the fall occurred whilst the deceased was in the discharge of his duty as a brakeman, and the legitimate inference from the proof was that he fell by reason of the round giving way:

Held, that the two — the admission and the proof — together establish that the deceased, in the discharge of his duty, and for the purpose of such discharge of duty, took hold of the round which, owing to an old break, easily discoverable by the defendant if an inspection had been made, and not seen by the deceased on account of the darkness of night and the necessary haste of its use, gave way, causing him to fall and be crushed by the train.

Held, also, that these facts establish both the negligence of the master and the freedom from negligence of the servant, and throws upon the master the entire responsibility of the accident. (*Id.*)

8. A referee appointed in supplementary proceedings suing for fees will not be permitted to show that property was discovered upon the examination, or that the judgment was in consequence paid. His action is upon the statute, and although the answer denies the rendition of any services, such evidence is improper, as it may unjustly influence the jury. (*Riddle agt. Cram, ante, 493.*)

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9. In this action, brought by the plaintiff to recover damages for the seduction and debauching of his daughter by the defendant, the latter answered by a general denial. No claim was made to recover punitive damages. Upon the trial the defendant offered to prove that before he had had connection with the daughter she had had connection with another man. This evidence was, upon the plaintiff's objection, excluded on the ground that to be admissible the facts should have been specially pleaded:

Held, that the court erred in rejecting the evidence; that the facts sought to be proved tended to reduce the actual damages sustained by the plaintiff in grief and injury to his feelings, and were admissible though not specially pleaded. (*Wandell* agt. *Edwards*, 25 *Hun*, 498.)

10. Under section 536 of the Code of Civil Procedure the defendant is only required to set forth in his answer the facts which he seeks to prove as "tending to mitigate or otherwise reduce the plaintiff's damages," when such facts tend to disprove malice, and so diminish or reduce the punitive or exemplary damages which the plaintiff may be entitled to recover.

That section does not prevent him from proving, under a general denial, any facts which tend to diminish or reduce the actual damages which the plaintiff claims to have sustained. (*Id.*)

11. This action was brought to recover as damages the value of certain spearmint oil loaned by the plaintiff's intestate to the defendant, upon his promise to return a like quantity and quality of oil. December 6, 1876, the intestate recovered a judgment, upon an inquest taken at the circuit, which was, on July 29, 1878, opened upon the application of a committee appointed for the defendant, upon his being ad-

judged an habitual drunkard. October 8, 1878, the intestate died, and thereafter the action was revived and continued by the plaintiff. Upon the trial the plaintiff gave evidence tending to show that upon the inquest the intestate was sworn in the presence of the defendant and gave evidence tending to show that such a demand as was required by the contract had been made. A witness was asked by the plaintiff if, upon the inquest, the defendant had an opportunity to examine the intestate. Upon the defendant's objection the answer was excluded. Thereafter the evidence as to the testimony given by the intestate upon the inquest was stricken out:

Held, that this was error, as it did not appear that the failure of the defendant to cross-examine the plaintiff's intestate was due to any fault or omission on the part of the latter. (*Bradley* agt. *Mirick*, 25 *Hun*, 272.)

12. On an issue as to whether the defendant was in possession of a farm as a tenant or under a contract of sale from the plaintiff's testator, a witness testified that he was present at a conversation between the plaintiff's testator and defendant, in which the testator asked the defendant for some rent, and the defendant said he had the money in the bank ready to pay when he knew who to pay it to:

Held, that the admission of evidence offered by the plaintiff to the effect that for a considerable period of time, embracing the time of the conversation, the defendant had several hundred dollars on deposit in the bank referred to, was error. (*Gorham* agt. *Price*, 25 *Hun*, 11.)

13. Where a plaintiff, suing as executor, proves by a third person a conversation between his testator and the defendant, it is competent for the defendant to state whether the conversation testified to ever took place. (*Id.*)

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14. In an action to recover damages for a failure by the defendant to perform a contract for the sale of real estate, where the value of the real estate at the time of the breach is to be determined, a witness, who was at that time engaged in a business which required his attention to be directed to the marketable value of property of the kind in question, and who was acquainted with that and other property of the same character in its vicinity, and knew at what prices such property was held by the persons owning and controlling it, is competent to express an opinion as to the value of the property in question. (*Jarvis* agt. *Furman*, 25 *Hun*, 391.)
15. Where, in an action upon a policy of insurance against fire, the defense is that the fire was set by the fraudulent act or procurement of the insured, the defendant is not required to adduce evidence of the same quality and degree as would be required to sustain an indictment for arson; it is sufficient if the charge be supported by a preponderance of the evidence, even though such evidence be insufficient to exclude all reasonable doubt. (*Johnson* agt. *Agricultural Ins. Co.*, 25 *Hun*, 251.)
16. Upon the trial of an action for slander, the plaintiff may, to show malice, prove the utterance of the same slanderous words, for which the action is brought, by the defendant at a time prior to that set forth in the complaint, although an action has heretofore been brought for the utterance of the words so spoken, which has been discontinued upon a settlement made by the defendant. (*Flanders* agt. *Groff*, 25 *Hun*, 553)
17. In an action to recover damages because of the speaking of slanderous words by the defendant concerning the plaintiff, evidence of all that occurred on the occasion — the words spoken and the acts done — is competent. (*Dalton* agt. *Gill*, 25 *Hun*, 120.)
18. It is competent on the trial of the question as to whether or not one is a partner, to ask him whether he was asked to become a partner, and what the result of the proposition was, and whether he had any interest in the capital or stock of the firm. (*Ades* agt. *Cornell*, 25 *Hun*, 78.)
19. A mortgagor who, after conveying the mortgaged premises has been made a party defendant to an action to foreclose a mortgage (but against whom no money judgment is asked and by whom no answer has been put in) is incompetent to testify in favor of his grantee in regard to a personal transaction between himself and the plaintiff's intestate. (*Smith* agt. *Hathorn*, 25 *Hun*, 159.)
20. Letters of administration, regular upon their face, are presumptive evidence of the legal appointment of the administrator named therein. (*Johnston* agt. *Smith*, 25 *Hun*, 171.)
21. Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover. (*Bergen* agt. *Urbahn*, 83 *N. Y.*, 49.)
22. Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable. A witness was asked by plaintiff's counsel, whether the

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switch was as high at the time of the trial as at the time of the accident; this was objected to and objection overruled:

Held, no error. (*Wooley* agt. *Grand St., etc., R. R. Co.*, 83 *N. Y.*, 121.)

23. Also, *held*, that it was not error to receive evidence that there had been other accidents at the same switch. (*Id.*)

24. After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer or builder, his testimony as to the value of a building is competent. (*Woodruff* agt. *Imp. F. Ins. Co.*, 83 *N. Y.*, 133.)

25. Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment:"

Held, that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act. (*Wehle* agt. *Conner*, 83 *N. Y.*, 231.)

26. In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (*sec. 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854*), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's status as a creditor and of the amount due him. (*Stephens* agt. *Fox*, 83 *N. Y.*, 313.)

27. The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pur-

sue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder. (*Id.*)

28. In such an action, on trial before a referee, after the case was closed it was reopened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the rehearing, defendant offered oral evidence to sustain a counter-claim:

Held, that it was properly excluded. (*Id.*)

29. In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony, and the evidence covering a great variety of facts, a witness called as an expert by plaintiff, after having testified that he had heard the testimony read to the jury the previous day, and the protest, and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them, was asked "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what in your opinion should have been done by the persons in charge of the steamship?"

Held, incompetent. (*Guterman* agt. *Liv., N. Y., etc., Co.*, 83 *N. Y.*, 358.)

30. The goods damaged were sold at public auction:

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Held, that evidence of the prices brought was competent as tending to show value, and upon the question of damages. (*Id.*)

31. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank:

Held, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. (*Hope* agt. *People*, 83 N. Y., 418.)

32. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. (*Id.*)

33. Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. (*Id.*)

34. Photographic pictures when shown to be correct resemblances of the person or thing represented are competent as evidence. (*Cowley* agt. *People*, 83 N. Y., 465.)

35. Plaintiffs, who were bankers,

loaned to B. Bros. & H. \$10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a large amount. The whisky was levied on by B., defendant's testator, then sheriff, under attachments, against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded:

Held, error; that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them. (*Duncan* agt. *Brennan*, 83 N. Y., 487.)

36. Oral testimony, or writings of a testator not attested as a will, showing a contrary intent from that expressed by the plain terms of the will, are incompetent as evidence and ineffectual to change those terms. (*Williams* agt. *Freeman*, 83 N. Y., 561.)

37. The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will. (*Id.*)

38. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge when crossing it in the night. Defendant had placed gates over the footway on each end of the draw which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. M. a boy in defendant's employ was called as a witness for it, and after testifying on cross-examination that he had been sent at times to pull down the gate, was asked if he told one B. on one oc-

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casion to pull it down. This was objected to and excluded:

Held, no error. (*Hart* agt. *H. R. Bridge Co.*, 84 *N. Y.*, 56.)

39. M. testified that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say in the presence of people at the draw, when the subject was discussed just after the splash in the water which he heard, that he saw the woman fall from the end of the bridge. One N. was called as a witness for plaintiff, who testified that he saw a boy among those gathered on the bridge after the draw was closed, but could not identify M. as the one. Plaintiff's counsel then offered to prove that the boy said he saw a woman fall off the bridge; this was excluded:

Held, no error; that the question as to the identity of M. with the boy whom N. saw was for the court to determine; also that the attention of M. was not called with sufficient particularity to the time, place, persons, &c., to lay a foundation for the impeaching evidence. (*Id.*)

40. A civil engineer having experience in the erection of bridges, as a witness for defendant, was allowed to testify, under objection and exception, that it was not customary to have gates of any kind on draw-bridges:

Held, no error; that it was competent for the defense to show that the bridge was constructed with extraordinary care. (*Id.*)

41. The same witness was asked, on cross-examination, whether it was safe and proper to have draws with drop-gates across the foot-path of a bridge when the draw was open; this was objected to and excluded:

Held, no error; that it was a matter of opinion and not within the range of expert evidence. (*Id.*)

42. Defendant W. was liable as sec-

ond indorser of a note upon which one F. was primarily liable. F. was also otherwise indebted to W. F. was the owner of certain land upon which C. had a mortgage, and upon which plaintiff had a prior mortgage. C. proposed that W. should take an assignment of his mortgage, and that F. should execute to W. a deed of the land as security for the payment of the sum he should advance to C. and for his liability as indorser; this was assented to by W., and F. and the parties went to the office of an attorney for the purpose of employing him to draw the necessary papers and to consummate the proposed arrangement. A deed of the land was then executed to W., containing a covenant by which he assumed and agreed to pay plaintiff's mortgage. In an action to foreclose said mortgage plaintiff sought to make W. liable for any deficiency, he claiming that the arrangement was changed at the attorney's office, and it was then agreed that F. should convey the land absolutely. To prove this plaintiff called the attorney, who was permitted to testify, under objection and exception, to the conversation between the parties when the deed was drawn:

Held, error; that the communications so made were privileged. (*Root* agt. *Wright*, 84 *N. Y.*, 72.)

43. The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment. (*Id.*)

44. Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule pro-

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hibits him from testifying to such communications in an action between his clients and a third person. (*Id.*)

45. The trial of an indictment for burglary and larceny, and for receiving stolen goods, was had after the passage of the act of 1876 (chap. 182, Laws of 1876) declaring that persons jointly indicted shall be competent witnesses for each other. One L. who was jointly indicted with the prisoner, was called as a witness on his behalf. His testimony was objected to and refused:

Held, error. (*People* agt. *Dowling*, 84 N. Y., 478.)

46. Some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the men of whom the alleged purchase was made. This was objected to and excluded:

Held, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge. (*Id.*)

47. The prosecution proved the finding at the house of the prisoner other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected:

Held, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show

that he came by the property honestly. (*Id.*)

48. In an action to recover damages for alleged negligence, proof of the violation of a city ordinance does not establish negligence *per se*; it is competent evidence upon the question to be submitted to the jury, but not conclusive. (*Knapp* agt. *Knick. Ice Co.*, 84 N. Y., 488.)

EXAMINATION OF PARTY.

1. When on the trial the plaintiff read in his own behalf the cross-examination of H., a deceased, party taken on a former trial, showing what had nowhere else appeared in the case, the existence of an indebtedness from the defendant M. to H., and which constituted the agreed consideration of the note:

Held, that by this proof or the sworn declarations of the deceased, the plaintiff encountered the exception in section 829 of the Code of Civil Procedure, and exposed himself to the evidence of the defendant M. as to the same transaction. (*Potts* agt. *Mayer*, *ante*, 126.)

See APPEAL.

Amsinck agt. *North*, *ante*, 114.

EXCEPTIONS.

1. An order sending the exceptions to the general term to be heard in the first instance does not suspend the entry of judgment, unless the order as entered also provides for the suspension of judgment upon the verdict. (*Douglass* agt. *Habestro*, *ante*, 29.)

2. The motion to be made in the general term is for a new trial on the exceptions, and all that court has power to do is to grant or refuse the motion. (*Id.*)

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3. Where 'in an action tried at the circuit, before the court and a jury, a nonsuit has been granted, the court cannot, since the passage of the Code of Civil Procedure, order the exceptions to be heard in the first instance at the general term. (*Seely* agt. *N. Y. C. and H. R. R. Co.*, 25 *Hun*, 280.)
4. Filed after decision of cause, tried by the court, to a failure of the court to decide question raised on trial, not available. (*See Hand* agt. *Kennedy*, 83 *N. Y.*, 149.)
5. Upon the trial of an action there was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached:
Held, that there was no exception bringing the error, if any, to the notice of this court. (*Develin* agt. *Cooper*, 84 *N. Y.*, 410.)

EXCISE LAW.

1. An execution is valid without any teste. (*People ex rel. Brown* agt. *Van Hoesen*, *ante*, 76.)
2. A person in jail for penalties for selling liquors in violation of chapter 628 of the Laws of 1857, is not entitled to the liberties of the jail. (*Id.*)
3. Section 32 of this act, which provides that "the person or persons against whom judgment shall be rendered, shall not be entitled, under any execution issued on such judgment, to the liberties of the jail," is not repealed by the Code of Civil Procedure. (*Id.*)
4. These actions were commenced by one R., under section 30 of the act of 1857 (*chap. 628*), which, in substance, provides that in case the overseers of the poor (in this county, the plaintiffs), whose duty it is to prosecute for any penalty incurred under the act to suppress intemperance and to regulate the sale of intoxicating liquors, shall neglect to prosecute for the period of ten days after complaint to them that any provision of said act has been violated, accompanied with reasonable proof of the same, that then any other person may prosecute therefor in their names, claiming that he had complied with the statute and that the commissioners had failed to perform their duty, and that he thereby acquired the right to use their names as plaintiffs. The commissioners base their omission to prosecute upon the insufficiency of the complaint and the proofs which accompanied it. From these proofs it appears that the complainant, who is a resident of Brooklyn, annexed to and made part of his complaint a printed copy of the City Record, containing the names of all the licensed liquor dealers of New York, about 9,000 in number, and all of these persons were charged in a general way with every conceivable violation of the excise act. R., the chief witness, resides in Richmond county, and two other persons named as witnesses are said to reside in the city of New York, but they fail to disclose their occupations, places of business or residence:
Held, that the relator, R., has not brought himself within the statute, that he has neither served the complaint nor furnished the proof required thereby, and that he had no authority to bring any action in the names of the plaintiffs founded on said complaint or proofs. (*Hess* agt. *Appell*, *ante*, 313.)
5. The complaint filed with the commissioners is not only unreasonable, but impracticable, and does not satisfy the requirements of the statute. (*Id.*)

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6. In such case the commissioners have the right to move to discontinue or dismiss the actions. (*Id.*)

EXECUTION.

1. An execution is valid without any teste. (*People ex rel. Brown agt. Van Hoesen, ante, 76.*)
2. In issuing an execution in a case where real property has been attached, the command to the sheriff should, among other things, require him to satisfy the judgment out of the real property belonging to the judgment debtor "on the day when the attachment was levied thereon," and on the day when the judgment was so docketed. (*Woolworth et al. agt. Taylor, ante, 90.*)
3. In this respect sections 649, 708 (*sub. 2*) and 1369 of the Code of Civil Procedure are all to have operation in harmony. (*Id.*)
4. Where the notice of sale is correct as to date of the attachment lien, the execution and certificates of sale made thereon may, if inaccurate, be amended, *nunc pro tunc*, to conform to the fact. (*Id.*)
5. Where, in a will, the testator directs his estate to be divided into a certain number of shares, and that one of said shares shall be held in trust to keep the same invested and to receive the rents, income and profits thereof, and pay the same over to the beneficiary named as they accrue and are collected, and the property devised by the testator is not invested in securities recognized by the rules of law applicable to investments by trustees, the trustee must sell and reinvest in accordance with such rule. (*Williams agt. James, ante, 134.*)

9. Code of Civil Procedure (*secs. 376-382, sub. 7*) prescribing the times within which actions upon

judgments must be brought relate only to the remedy by action and do not affect the remedy by execution. (*See Kincaid agt. Richardson, 25 Hun, 237.*)

7. Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 R. S., 512, § 28, *sub. 4, amended by chap. 101, Laws of 1879*), which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment debtor, and all who hold under him under pretense of title acquired from him, posterior to the judgment. (*People ex rel. Higgins agt. McAdam, 84 N. Y., 281.*)
8. Accordingly held, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors, recovered prior to the appointment of the receiver, the supreme court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the supreme court the receiver was in effect the person against whom the execution was issued. (*Id.*)

EXECUTOR.

- See WILL.
Onderdonk agt. Ackerman, *arts.*, 318.

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See SHERIFF.

Douglass agt. *Haberstro*, ante, 455.

FALSE IMPRISONMENT.

See ATTORNEY.

Fisher agt. *Langbein*, ante, 238.

FALSE RETURN.

1. The plaintiff herein appealed from a judgment recovered against her in an action brought by one Pope, before the defendant, a justice of the peace. Owing to the falsity of the return made by the defendant the appeal was heard on the law and not on the facts as desired by the plaintiff, and the judgment of the justice affirmed.

In this action brought by her to recover the damages sustained by her by reason of the false return, the judge charged that she was entitled to recover the costs paid in the county court and the reasonable and proper expense she was put to in applying for the new trial:

Held, that the charge was sufficiently favorable to the defendant. (*Brooks* agt. *St. John*, 25 *Hun*, 540.)

FEES.

1. Keeper's fees not being a service for which any fee or compensation is fixed or allowed by law, an agreement to pay such fees, if not illegally extorted, is a perfectly valid one in law. (*Maguin* agt. *Rosenthal*, ante, 504.)

FINDINGS OF LAW AND FACT.

1. Where the findings of fact, by a referee, conflict, the defeated party is entitled to those most favorable to him and may rely upon them in aid of exceptions to the referee's conclusions of law. (*Schwinger* agt. *Raymond*, 83 *N. Y.*, 192.)

2. Where findings contained in the case, as settled by a referee, differ from those contained in his report the former will be deemed correct, as it is upon the case that exceptions stand (*Code of Civil Procedure*, sec. 997). (*Id.*)

3. The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery. (*Loeb* agt. *Hellman*, 83 *N. Y.*, 601.)

4. The provision of the Code of Civil Procedure (§ 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of Rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. (*Gormerly* agt. *McGlynn*, 84 *N. Y.*, 284.)

FORECLOSURE.

1. An action upon a guaranty of a mortgage is within the provision of the Revised Statutes (2 *R. S.*, 191, §§ 153, 154), prohibiting any proceedings unless authorized by the court, after bill filed to foreclose a mortgage for the recovery of the debt secured by the mortgage; and in the absence of such authority the action is not maintainable. (*McKernan* agt. *Robinson*, 84 *N. Y.*, 105.)
2. Where, however, such an action has been commenced without pre-

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vious authority, the court may by subsequent order made *nunc pro tunc* grant permission, and so remove the impediment to the maintenance of the action founded upon the statute. (*Id.*)

3. By the appointment of a receiver in a foreclosure suit the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them. (*Rider agt. Bagley*, 84 N. Y., 461.)

4. *It seems* that, assuming the court has power to compel such owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. (*Id.*)

5. So, also, where fraud or contempt upon the supreme court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. (*Id.*)

FOREIGN CORPORATIONS.

1. Where a suit is brought against a foreign corporation, though a general appearance by defendant before answering gives the court jurisdiction over its person, it does not necessarily give jurisdiction over the subject-matter of the action, and where some of the plaintiffs are non-residents, the complaint must be dismissed as to them, a case not being made out under section 1780 of the Code of Civil Procedure. (*Ervin agt. The Oregon Railway and Navigation Company and others*, ante, 490.)
2. A resident plaintiff, however, where the complaint makes out a

cause of action may maintain the suit, though the acts out of which the cause of action arises were done, and the property from the management and disposition of which the plaintiff's loss and damage were sustained are beyond the jurisdiction, and the relief within the power of the court to grant may be incomplete. (*Id.*)

3. That the stock of such plaintiff, suing as a stockholder, has not been registered, is no reason why he should not maintain the action. (*Id.*)

GENERAL TERM.

1. Where a plaintiff in an action for partition dies after argument at general term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the general term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. (*Bergen agt. Wyckoff*, 84 N. Y., 639.)

GUARDIAN AD LITEM.

1. A guardian *ad litem* can only be regularly appointed for such a defendant after service of summons personally or by the substituted mode of service prescribed. (*Ingersoll agt. Mangum*, 84 N. Y., 622.)

HUSBAND AND WIFE.

1. Under section 450 of the Code of Civil Procedure in an action against a married woman for her personal tort, it is not necessary to join her husband as a defendant, and he is not a proper party to such an action. Where on a motion for a new trial by one of the defendants, it appeared, as a question of law, that there could be no recovery as against such defendant, and that a new trial would not change the result:

Held, that the verdict should be

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set aside, and a nonsuit directed as to such defendant. (*Fitzgerald agt. Quann, ante, 331.*)

ILLEGAL TRADE.

See SUMMARY PROCEEDINGS.

The People ex rel. Shaw agt. McCarty et al., ante, 152.

IMPRISONMENT.

1. A sentence to imprisonment takes effect only from the first day of actual incarceration, and not from the day when sentence is pronounced. (*People ex rel. King agt. McEwen, ante, 226.*)
2. Under the Code of Civil Procedure in an action in which the defendant is liable to arrest, and in which the plaintiff is unsuccessful in his suit, the latter may be arrested and imprisoned by the defendant's attorney on a claim for costs. (*Parker agt. Spear, ante, 394.*)
3. And this is true, although the plaintiff did not exercise his right to arrest the defendant, and although he may have a perfectly good case, but loses his suit on a mere technicality. (*Id.*)
4. On convictions for misdemeanor the sentence begins to run from the day it is pronounced, and the time the prisoner is detained in the county jail is to be credited upon the sentence (*This seems to be adverse to People ex rel. King agt. McEwen, ante, 226.*) (*The People agt. Lincoln, ante, 412.*)

IMPROPER JOINDER.

1. Where a complaint in an action against an individual defendant and the city to recover damages for injuries from a fall caused by accumulations of snow and ice

upon the sidewalk in front of certain premises alleges that it was the duty of both defendants to maintain the sidewalk in front of said premises free from incumbrances of ice and snow, and also alleges that they permitted a cellar extending under the street to remain open:

Held (upon demurrer), that as two causes of action are set out in the complaint—one for permitting ice and snow upon the sidewalk, and the other for injuries sustained by plaintiff's falling into the cellar—and as the individual defendant is not, as matter of law, liable for accumulations of snow and ice, two causes of action are improperly joined. (*Kelly agt. Newman, ante, 156.*)

2. It is no answer to the demurrer to say that such causes of action are not separately stated. (*Id.*)

INCUMBRANCE UPON PIER.

1. Where, in an action to compel the removal from an East river wharf of a building erected by the owner of the wharf for the exclusive benefit of his own business, and without a written license from the department of docks, it appears that the wharf has been used by the public as a highway and for the loading and discharging of sailing vessels engaged in foreign commerce and having a draft of more than eighteen feet of water: *Held*, that the building is an incumbrance, an interference with the dominant right of the public, and must be removed, and that the attorney-general has the right to bring the action. (*The People agt. Macy, ante, 65.*)

INDICTMENT.

1. Every application for the removal of an indictment must rest in the

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sound discretion of the court or judge who is to determine it. (*The People* agt. *Sessions*, ante, 415.)

2. A motion of this character should be granted not only when the obtaining of an impartial and fair trial requires it, but also whenever the situation and official standing of the accused party, the undisputed and clearly divided line of popular opinion, and the circumstances of the alleged crime, as well as the important legal questions which it presents, so magnify the importance of the cause as to justify its removal from the inferior to the superior tribunal for trial. (*Id.*)

3. S., a member of the senate of this state, was indicted in the court of sessions of Albany county for the crime of bribery, the act alleged being the payment by him of \$2,000 to B., then a member of assembly, to induce the said B. to vote for D. to represent the state in the senate of the United States. On a motion by defendant to remove the indictment from the court of sessions to the court of oyer and terminer:

Held, that as this case would involve difficult legal questions (see chap. 599, *Laws of 1853*; chap. 742, *Laws of 1869*; article 15 of the *Constitution*); that the political and official standing of the accused, the act charged and the warm and bitter feelings which the allegation of its perpetration caused have magnified this cause far above and beyond an offense committed under other and different circumstances, renders it a case of sufficient importance as to justify its removal. (*Id.*)

4. Although the notice was one to be made at special term, and not to a judge of the court; *held*, that as a special term must be held by a single judge, and as the judge who in fact held it, when the motion was made, is the identical one specified in the notice of motion

before whom, at special term, it would be made, the objection must be disregarded. As the notice is of a motion "before Mr. justice WESTBROOK," the addition thereto "at the next special term," &c., may be rejected as surplusage. (*Id.*)

INFANTS.

1. Where infants have been injuriously affected by the misconduct of the attorneys in the action, either by surprise or if any newly discovered evidence can be secured, the court in which the action was brought has power to grant a new trial. (*Weidersum et al.* agt. *Nauman et al.*, ante, 369.)

2. Where, in a foreclosure suit, the summons was personally served upon two of the defendants, minor children, under the age of fourteen, of the mortgagor, who died intestate before the action was commenced, but was not served upon their mother or general guardian:

Held, that the service was not such as to give the court jurisdiction over the person or property of the infants, even though a guardian *ad litem* appointed for them appeared in the action and put in an answer for them; and a judgment of foreclosure of the mortgage and sale thereunder cannot be validated by acts done subsequent to such judgment and sale. (*Bellamy* agt. *Guhl*, ante, 460.)

3. A judgment entered without service of process is not within the remedial scope of sections 724 nor 783 of the Code of Civil Procedure. (*Id.*)

INJUNCTION.

1. In an action for a limited divorce an injunction was granted restraining defendant from interfering with plaintiff's possession and occupancy of a certain house. A

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final judgment was afterwards entered granting a divorce and alimony which contained no reference to the injunction and granted no other:

Held, that as the judgment covered the whole case it superseded the injunction; that it was the further order of the court, and an appeal taken therefrom would not affect it so as to restore or reinstate the injunction. (*Gardner* agt. *Gardner*, ante, 265.)

2. While, as a general rule, the courts of this state will decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the courts of a sister state, there are exceptions to this rule; and where a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it. (*Claffin & Co.* agt. *Hamlin*, ante, 284.)

3. Thus, when F. N. Hamlin and Robert W. Hale (now dead) were, in 1871, copartners in business in Chicago and were burned out by the great fire of that year, their indebtedness amounted to over \$1,000,000 and the plaintiffs were the largest creditors. A compromise was effected for fifty cents on the dollar. F. N. Hamlin started in business again with another partner, the plaintiffs loaning the new firm large sums of money. F. N. Hamlin, in 1876, being refused a loan of \$15,000 by the plaintiffs, charged them with having received more than they were entitled to under the compromise, and has since brought a number of suits against them in Illinois in the name of his father alleging conspiracy on their part with his former partner, Hale, to defraud the other creditors. The plaintiffs assert that the suits are brought for blackmailing pur-

poses, and that the assignments from creditors of Hamlin's firm, on which they are based, have been decided to have been obtained by fraudulent representations:

Held, that this is one of those *special cases* which warrant the court in exercising its power, and that the suit brought by John W. Hamlin in the state of Illinois was not brought in good faith and was brought for the purpose of vexing, annoying and harrassing the plaintiffs in this action, and, therefore, the preliminary injunction should be continued until the cause can be tried. (*Id.*)

See TRADE MARK.

Fleischmann agt. *Schuckmann*, ante, 92.

See BROOKLYN ELEVATED RAILWAY.

Negus agt. *City of Brooklyn*, ante, 291.

See ASSOCIATION.

Supreme Council of the Order of Chosen Friends agt. *Fairman*, ante, 387.

See ACTION.

Bates et al. agt. *Plonsky et al.*, ante, 429.

INJUNCTION.

1. Under the Code of Civil Procedure an injunction staying the execution of a warrant issued upon a final order, made in summary proceedings for the recovery of the possession of real property, can only be granted in a case where one would be granted to stay the execution of the final judgment in an action of ejectment. (*Knox* agt. *McDonald*, 25 *Hun*, 268.)
2. To justify the granting of the injunction, it must be shown that the plaintiff is making an oppressive use of the judgment, or that he has ceased to own the prem-

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ises, or that the defendant has, subsequently to its recovery, acquired some interest or equity in the property which should be protected, or that the judgment was obtained by fraud or collusion. (*Id.*)

INSANITY.

1. The defense of insanity is an affirmative defense, and the prisoner is bound to satisfy the jury, by proof, that he was insane. (*The People* agt. *O'Connell*, ante, 436.)
2. The mere fact that a person is insane does not *per se* relieve him from responsibility. The test is, whether he is capable of distinguishing between right and wrong at the time of and with respect to the act complained of. (*Id.*)
3. Drunkenness in itself, simple drunkenness, whether it is of limited measure or whether it is excessive, does not constitute insanity, and does not excuse a person committing an act from the responsibilities of that act. (*Id.*)
4. But if a person committing an act or doing an injury is in a state of "*delirium tremens*" at the time, and is therefore rendered unable to determine the nature or the quality of the act, or its right or its wrong, then he is relieved from the responsibility; and the same rule applies to general insanity if the man does not comprehend the nature and quality of that which he does and the right or the wrong, then he is relieved; if he does comprehend both, then he is responsible for that which he does. (*Id.*)
5. Where the defense of insanity had been interposed, the court after charging the above propositions as to the law of insanity, also charged, if "you have a reasonable doubt, from the evidence

in this case, that the prisoner is guilty of this crime, then you should give him the benefit of that doubt, and he should stand acquitted; if you have no such doubt, then you should pronounce him guilty." The prisoner's counsel requested the judge to charge "that if from the evidence in the case a reasonable doubt arises in the jurors minds as to the sanity or insanity of this defendant, that he is entitled to the benefit of that doubt." The court refused so to charge. A further request to charge: "The defense are not required to establish, beyond a reasonable doubt, the insanity of the prisoner. If the evidence raises a reasonable doubt whether he was insane or not, he is entitled to that doubt," was also refused:

Held, that the charge was a complete and correct charge upon the subject of insanity, and the requests to charge were properly refused.

Held, also, that the charge as made being correct, the prisoner's counsel had no right to request, nor was it the duty of the court to repeat in substance such charge in different form and words.

Held, further, that the requests to charge was too broad and does not accord with the law as it exists in this state. (*Id.*)

INSOLVENCY.

1. Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 R. S., 28, § 1, *et seq.*), contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings. (*Develin* agt. *Cooper*, 84 N. Y., 410.)

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2. If the order omits a recital of any necessary fact the sheriff will be protected if he can show *aliunde* the existence of the fact. (*Id.*)
3. The said article includes a debtor who has been charged in execution. (*Id.*)
4. The proof required to be made at the time of presenting the petition, and before granting the discharge (2 *R. S.*, 35, § 2), that the debtor resides, or is imprisoned, in the county in which the officer to whom the application is made resides, may be made by the verified petition alone. (*Id.*)
5. In an action against a sheriff for an escape, wherein he justified under a discharge granted by the county judge of the county of Suffolk, which contained a recital that "Frederick Maxwell, the debtor, of the town of Southold, in the county of Suffolk, did present a petition:"
Held, that the recital was sufficient proof of the place of residence, and that proof thereof was made to the officer granting it. (*Id.*)
6. The petition, which was verified to be "true in all respects," began thus: "The petition of Frederick Maxwell, of Southold, in the county of Suffolk, * * * respectfully sheweth," etc. The petition recited that Maxwell was in custody of the sheriff of Suffolk county on execution and had given bail for the jail liberties:
Held, that the first statement was not sufficient to make proof of residence in the county; but that being out of jail on the liberties was, in the judgment of the law, being in prison; and the last recital, therefore, was in effect an averment of imprisonment in the county, and so gave jurisdiction of the person of the debtor. (*Id.*)
7. The said article of the Revised Statutes was not repealed by the act abolishing imprisonment for debt (*chap.* 300, *Laws of 1831*). (*Id.*)
8. Nor was it repealed by the provision of the Code of Procedure (§ 179, *sub.* 4), authorizing the arrest of a defendant in an action on contract who has been guilty of fraud in contracting the debt or incurring the obligation. (*Id.*)
9. The provision of the statute (2 *R. S.*, 24, § 35, *sub.* 7) declaring a discharge of an insolvent from his debts void "if he shall be guilty of any fraud whatever, contrary to the true intent" of the article, refers to a fraud perpetrated in the proceedings to obtain the discharge, not to a fraud in the creating of the debt. (*Id.*)
10. It was proved that the discharge was handed to the defendant and he was asked if he would let Maxwell go; that he took time to advise with his counsel, and that the next day Maxwell was at his home beyond the jail liberties:
Held, the presumption was that he was set free in consequence of the discharge. (*Id.*)

INSOLVENT INSURANCE COMPANY.

1. Where an attorney was employed by an individual to bring a suit or conduct proceedings against an insolvent insurance company, whose assets had been placed in the hands of a receiver, such proceedings having for their purpose and effect the protection of the general fund and assets of the company, and their concentration in such shape and under such control as should be for the benefit of all policyholders and others concerned in the same:
Held, that the court has power to order the services paid for out of the funds in the hands of the receiver. (*Attorney-General agt. Continental Life Insurance Co., ante*, 130.)

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2. The protection of trusts requires representative proceedings, and *when necessary and proper* should be encouraged, and the court as the administrator of the trust has the power to compensate those who aid it in the discharge of their duty. (*Id.*)

INSURANCE (LIFE).

1. Where a life insurance policy was issued upon the life of the husband for the use of his wife, and if she died before him the amount of insurance was payable "to her children for their use, or to their guardian if under age," and the wife died before her husband:

Held, that a grand child of the insured, the issue of one of the children who died before his mother, is entitled to a share under the policy. (*Hull et al. agt. Hull et al., ante, 100.*)

2. An endowment policy on the husband's life, payable on a certain date to the wife or her personal representatives, is within the act of 1840, and therefore subject to the rule of non-assignability (*Affirming S. C., 58 How., 239.*) (*Brummer agt. Cohn, ante, 171.*)
3. A life policy which, as originally issued, was declared to be for the use of the wife of the insured, is not changed in its character by being afterward changed to a "paid-up" policy; and being non-assignable under the laws of the state during the life of the insured, any transfer of the widow's interest in it, though made in another state, could not be deemed valid here. (*Mutual Life Insurance Co. agt. Ferry, ante, 325.*)

JAIL LIBERTIES.

1. A person in jail for penalties for selling liquor in violation of chapter 628 of the Laws of 1857, is not entitled to the liberties of the jail.

(*People ex rel. Brown agt. Van Hoosen, ante, 76.*)

2. Section 32 of this act, which provides that "the person or persons against whom judgment shall be rendered, shall not be entitled, under any execution issued on such judgment, to the liberties of the jail," is not repealed by the Code of Civil Procedure. (*Id.*)

JUDGMENT.

1. A purchaser of property who takes title under a decree or judgment of a court that was without jurisdiction to grant it, acquires no title, but out of possession, may bring ejectment. Purchasers of property under a decree or judgment of the court are not responsible for the acts of the parties in that judgment, of which they had no notice. (*Weidersum agt. Naumann et al., ante, 369.*)
2. Before a decree or judgment of a court can be set aside, the parties interested must have an opportunity to be heard, and therefore must be made parties to the action in which the decree or judgment is sought to be set aside. To justify any interference with the judgment of a court, the testimony as to fraud or collusion must be very clear and strong; there must be clear and conclusive evidence of fraud. (*Id.*)
3. Where infants have been injuriously affected by the misconduct of the attorneys in the action, either by surprise or if newly discovered evidence can be secured, the court in which the action was brought has power to grant a new trial. (*Id.*)

See INFANTS.

Bellamy agt. Guhl, ante, 460.

See INJUNCTION.

Gardner agt. Gardner, ante, 265.

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See PRACTICE.

Townsend agt. *Simpson*, ante, 506.

4. The plaintiff, how had been appointed a receiver in supplementary proceedings instituted against a firm, brought this action against the defendant to set aside as fraudulent a general assignment made by the said firm to him, and recovered a judgment therein setting aside the assignment, adjudging that the defendant had received \$2,500, and requiring him to pay, out of the assets so received, to the plaintiff the sum of \$2,196.17, with interest and costs. Thereafter the defendant presented to the judge before whom the action was tried an affidavit showing that he had received but \$2,631.37; that before the commencement of this action he had paid out \$430.77, and that in an action of replevin brought against him by one Rockwell, which was tried and decided at the same time and by the same judge who tried and decided this action, a judgment for \$334.05 had been recovered against him, and moved thereon, and obtained an order to the effect that he, the defendant, be charged with \$2,631.37 and interest, to wit, \$2,786.37, and credited with the amounts set forth in the affidavit, to wit, \$766.27, and ordering that the roll be taken from the files and the decision and judgment be amended so as to declare that the assets in the defendant's hands, applicable to the payment of the plaintiff's demand were \$2,020.10:

Held, that the order was improperly made, and should be reversed; that the plaintiff's remedy, if any, was by appeal or by a motion for a new trial. (*Rockwell* agt. *Carpenter*, 25 *Hun*, 529.)

5. A. recovered judgment against B. for \$150 and assigned it for a valuable consideration, and without notice to B., to his attorney C., who took it in good faith. B. thereafter recovered judgment

against A. and assigned it to his attorney D.

D. obtained in supplementary proceedings on the judgment so assigned to him an order that B. pay to D., out of the \$150 supposed by B. to be due to A. (but in fact due to A.'s assignee), fifty dollars on the judgment held by D. against A.:

Held, that the proceedings in which such order was made could not prejudice the rights of C. in the judgment assigned to him by A.

That the payment made by B. under such order was not a payment to C. on the judgment assigned to him.

That A., the assignor of C., was entitled to appeal from the order directing the payment of the fifty dollars to D. (*Lee* agt. *Delehanty*, 25 *Hun*, 197.)

6. Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. (*Risley* agt. *Phoenix Bk. of N. Y.*, 83 *N. Y.*, 318.)
7. *It seems* that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor. (*In re Flandrow*, 84 *N. Y.*, 1.)
8. Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. (*Leonard* agt. *Col. S. Nav. Co.*, 84 *N. Y.*, 48.)
9. This action was brought upon a judgment obtained in the state of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. R. G. & Co. That action was brought by the members of the firm, he

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stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. It appeared that the rule of the common law, that choses in action are not assignable, and that actions thereon, when assigned, must be brought in the name of the assignor, prevails in said state, and that the laws of said state authorized, in case of assignment, a statement such as was contained in the declaration:

Held, that the judgment-roll furnished presumptive evidence that plaintiff was the owner of the judgment; that the plaintiff in such an action is merely a nominal party having no interest in or right to control it; nor is he a trustee in any rightful sense under the Code, and so plaintiff alone could sue upon the judgment. (*Greene* agt. *Republic F. Ins. Co.*, 84 N. Y., 572.)

10. The supreme court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here. (*Wilson* agt. *Simpson*, 84 N. Y., 674.)

JUDICIAL NOTICE.

1. *It seems* that the court will take judicial notice of the nature of the business and the office of mercantile agencies. (*Eaton C. & B. Co.* agt. *Avery*, 83 N. Y., 31.)
2. The courts will take judicial notice of the general course of business in a community, including the universal practice of banks. (*Merchants' Nat. Bk.* agt. *Hall*, 83 N. Y., 338.)

JUDICIAL SALES.

- 1 A judgment of foreclosure directing the sale of mortgaged premises

by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (*sec.* 184, *sub.* 4), and an advertisement of the premises for sale is a "seizure" within said provision. (*Un. Dime Sogs. Instn.* agt. *Anderson*, 83 N. Y., 174.)

2. Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office under such a judgment, advertised premises for sale upon a day after his term had expired, *held*, that he had authority and was bound to proceed with and complete the sale. (*Id.*)

JURISDICTION.

1. The objection that a county court has not jurisdiction over the person of the defendant must be raised at the first opportunity, and is waived by his appearing in the action and pleading to the merits. (*Potter* agt. *Neal*, *ante*, 158.)

See COUNTY COURTS.

Lenhard agt. *Lynch*, *ante*, 56.

2. Where a court authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. (*Risley* agt. *Phoenix Bk.*, 83 N. Y., 318.)
3. Court of appeals no jurisdiction to entertain motion to set aside a judgment below. (*See Veeder* agt. *Baker*, 83 N. Y., 163.)
4. Under the act of 1879 (*chap.* 390 *of Laws of 1879*), courts of special sessions have exclusive jurisdiction to try "charges for petit larceny not charged as a second

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offense," and the supreme court has no power to let to bail one charged with that offense. (*People ex rel. agt. Dutcher*, 83 N. Y., 240.)

5. Where order in supplementary proceedings made in district where venue was laid and roll filed appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides, such justice has power to change referees and the exercise of this power is discretionary and not reviewable here. (*See Pardee agt. Tilton* [Mem.], 83 N. Y., 623.)

6. The jurisdiction of quasi judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction. (*Cagwin agt. Town of Hancock*, 84 N. Y., 532.)

7. Under the provisions of the Code of Procedure (*sec.* 227), as amended by section 6, chapter 723, Laws of 1866, declaring that, for the purposes of an attachment, an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and, upon omission so to do, the jurisdiction which attached on granting the warrant ceased. (*Blossom agt. Estes*, 84 N. Y., 614.)

JURY.

See EVIDENCE.

Dunn agt. James, ante, 307.

Jones agt. New York Central and Hudson River Railroad, ante, 450.

See BURDEN OF PROOF.

Fleming agt. Northampton National Bank, ante, 177.

JUSTICE OF THE PEACE.

1. The plaintiff herein appealed from a judgment recovered against her in an action brought by one Pope, before the defendant, a justice of the peace. Owing to the falsity of the return made by the defendant the appeal was heard on the law and not on the facts as desired by the plaintiff, and the judgment of the justice affirmed.

In this action brought by her to recover the damages sustained by her by reason of the false return, the judge charged that she was entitled to recover the costs paid in the county court and the reasonable and proper expense she was put to in applying for the new trial:

Held, that the charge was sufficiently favorable to the defendant. (*Brooks agt. St. John*, 25 Hun, 540.)

2. Proceedings before a justice of the peace to procure the commitment of one alleged to have been guilty of a criminal contempt, as provided by sections 2870 to 2874 of the Code of Civil Procedure, the party accused is entitled to be sworn and to testify in his own behalf, and to have the testimony of witnesses produced by him taken; and a refusal of the justice to receive such testimony will render the commitment void. (*People ex rel. Schlosser agt. Porter*, 25 Hun, 601.)

JUSTICE'S JUDGMENT.

1. A proceeding instituted in a justice's court by a city to recover the penalty imposed for a violation of a city ordinance is a civil action, and under section 351 of the old Code the judgment of the justice can only be reviewed by appeal. (*City of Buffalo agt. Schliefer*, 25 Hun, 275.)

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JUSTIFICATION.

See UNDERTAKING.

Stern et al. agt. Staples, ante, 380.

JUSTICES' COURTS.

See APPEAL.

Bishop agt. Van Vechten, ante, 261.

LANDLORD AND TENANT.

1. Where a tenant knowingly sublets a portion of the demised premises for a policy shop, the lease of the tenant may be annulled by the landlord, and the tenant may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an overholding tenant. (*The People ex rel. Shaw agt. McCarty et al., ante, 152.*)
2. The principles laid down in same case reported in 59 Howard's Practice, 487, sustained. (*Id.*)

LIMITATIONS (STATUTE OF).

1. In a suit against the city for damages for injuries sustained from falling upon a crosswalk in which the complaint alleges that defendant, notwithstanding it was its duty to keep the streets in good order and repair and not to suffer the ice or snow to remain in such condition on the crosswalks as to make it unsafe and dangerous for foot passengers, had improperly, carelessly, negligently and unlawfully suffered ice and snow to remain upon the crosswalk where plaintiff fell, in such a condition as to render it dangerous for ordinary use:

Held (upon demurrer to answer setting up statute of limitations), that subdivision 5 of section 383 of the Code of Civil Procedure prescribing a limitation of three years for actions based upon negligence does not apply, and that

defendant's alleged neglect in suffering ice and snow to remain on the crosswalk so as to be unsafe and dangerous to foot passengers was a wrongful act within the purview of section 382 prescribing six years as a limitation to actions arising for such cause. (*Dickenson agt. The Mayor, &c., of New York, ante, 255.*)

2. By the amendment of section 88 of the Code of Procedure in 1870 (*sec. 5, chap. 741, Laws of 1870*), striking out married woman from the list of persons against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed upon the same footing as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment. (*Clarke agt. Gibbons, 83 N. Y., 107.*)
3. Accordingly, *held*, in an action of ejectment brought by a married woman that an adverse possession of twenty years was a good defense. (*Id.*)

MANDAMUS.

See ALBANY MEDICAL COLLEGE.

The People ex rel. Swinburne agt. Albany Medical College, ante, 220.

1. It is a sufficient excuse to the trustees of a municipal corporation, for disobedience of a writ of *mandamus*, that they have been enjoined by a judgment of the court, regularly entered in an action brought against them, from doing the very acts which, by the writ of *mandamus*, they are ordered to do. (*People ex rel. Duffy agt. Village of West Troy, 25 Hun, 179.*)
2. A writ of *mandamus* should not be granted where there is doubt

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as to the rights of the claimant, as in such case he should be left to his common-law remedy. (*Id.*)

2. It is not proper for the court, on motion of a creditor of a municipal corporation (seeking a *mandamus* against its officers requiring them to pay his claim), to set aside and vacate an injunction contained in a judgment, regularly and without collusion obtained in an action (to which the creditor was not a party), against such officers forbidding them to pay such claim. (*Id.*)

4. The chamberlain is but the agent or servant of a village, and a judgment which enjoins the doing of an act by the president and trustees of the village, is binding on the chamberlain, although he is not a party to the action or named in the judgment. (*Id.*)

MARRIAGE.

See DIVORCE.

Finn agt. *Finn*, ante, 83.

MEMORANDA.

See EVIDENCE.

Dunn agt. *James*, ante, 307.

MERGER.

1. Whether an inferior security is merged in one of a higher character depends upon the intentions of the parties; and when justice and equity require that it should be distinctly kept alive it will not be regarded as merged. (*Smith* agt. *Roberts*, ante, 196.)

MORTGAGE.

1. Where a mortgage was made of certain real property used for a

sugar refinery, "and also all the machinery and effects in the said sugar refinery," and was recorded as a chattel mortgage:

Held, that the mortgage covered the sugar upon the premises. (*Thurber* agt. *Minturn*, ante, 27.)

MORTGAGE FORECLOSURE.

1. On June 15, 1865, B., who had previously given a mortgage to S., plaintiff's testator, for \$6,500 gave him another mortgage for \$3,000 upon the same premises, and on the same day conveyed to him an undivided one-fourth part of the premises for \$3,500. The deed recites that the whole premises are covered by the \$6,500 mortgage and that one undivided half part is subject to an agreement to sell to S., dated in 1863. In 1867 B. conveyed to S. one undivided half of the premises, and on the same day the \$6,500 mortgage was canceled. In 1874 B. executed a mortgage to defendant for \$15,000, covering one undivided fourth of the premises. In this action to foreclose the \$3,000 mortgage:

Held, that it is a valid lien for its face upon the undivided one-fourth part of the premises which remained in B., and that the judgment in defendant's action to foreclose his mortgage does not affect the plaintiffs' lien in this action. (*Smith* agt. *Roberts*, ante, 196.)

2. Prior mortgagees are not necessary parties to an action of foreclosure, but sometimes they are proper parties. (*Id.*)
3. Whether an inferior security is merged in one of a higher character depends upon the intentions of the parties; and when justice and equity require that it should be distinctly kept alive it will not be regarded as merged. (*Id.*)

See REVIVAL OF ACTION.

Weyh agt. *Boylan*, ante, 397.

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MOTIONS AND ORDERS.

1. The supreme court has no power to grant an order, on application of the referee in an action, requiring the plaintiff to pay the referee's fees and take up the report. (*Geib* agt. *Topping*, 83 N. Y., 46.)
2. When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. (*Veeder* agt. *Baker*, 83 N. Y., 163.)
3. *It seems*, that the motion should be made in the Supreme Court. (*Id.*)
4. The granting of an order in proceedings to disbar an attorney against the objection of the attorney, directing that a commission issue, is error; and that the order is not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder." (*In re an Attorney*, 83 N. Y., 164.)
5. For the purposes of a motion to dismiss, an appeal is to be regarded as pending where notice of appeal was duly served and undertaking given, and the appellant has not abandoned the appeal. (*Stevens* agt. *Glover*, 83 N. Y., 611.)
6. An order of general term refusing to open a default is not appealable. (*Id.*)
7. So, also, a judgment of affirmance by default of the general term is not reviewable here. (*Id.*)
8. Where an action has been commenced without previous authority upon guaranty of a mortgage, after the bringing of an action to foreclose the mortgage, the court may by subsequent order made *nunc pro tunc* grant permission, and so remove the impediment to the maintenance of the action founded upon the statute. (*McKernan* agt. *Robinson*, 84 N. Y., 105.)
9. Where an order of special term was "in all respects affirmed" by the general term, *held*, that this court could only look to the order to ascertain the ground upon which the court below proceeded. (*Direct U. S. Cable Co.* agt. *Dom. Tel. Co.*, 84 N. Y., 153.)
10. Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 R. S., 28, sec. 1, *et seq.*), contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings. (*Develin* agt. *Cooper*, 84 N. Y., 410.)
11. It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1867 (*chap.* 361, *Laws of 1867*) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted. (*Bassett* agt. *Wheeler*, 84 N. Y., 466.)
12. Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the ques-

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tion was not reviewable here. (*Code of Civil Procedure, sec. 1337. (Id.)*)

13. Where an order is made by this court on appeal from a judgment, reversing the judgment, with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. (*First Nat. Bk. of M. agt. Fourth Nat. Bk., 84 N. Y., 469.*)

14. Where a plaintiff in an action for partition dies after argument at general term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the general term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. (*Bergen agt. Wyckoff, 84 N. Y., 659.*)

MUNICIPAL CORPORATIONS.

1. No valid agreement can be made by the official representative of a municipal corporation which will, on a measure of public policy, bind their successors. (*Goff agt. Nolan, ante, 323.*)
2. A common council has the sole right to decide all questions of parliamentary law. (*Id.*)
3. A motion for a reconsideration of a vote upon the passage of a resolution, after a declaration by the presiding officer that it was lost, does not invalidate the vote taken upon it. If the resolution has been lost it is competent for the body to introduce it anew and pass it, and the mode, therefore, of changing their first action is entirely within their control. The supreme court has no power to review the discretion of a common council as to the necessity of widening a street, and taking the property of an individual for that purpose. (*Id.*)

4. That a certain alderman would be benefited, together with the general public, by the widening of a certain street, does not make his vote as to such widening void. (*Id.*)

See COSTS.

Baine agt. City of Rochester, ante, 346.

NATIONAL BANK.

See ATTACHMENT.

People's Bank of New York agt. Mechanics' National Bank of Newark, ante, 422.

NEGLIGENCE.

See DEED.

Withaus agt. Schaack, ante, 167.

See BURDEN OF PROOF.

Fleming agt. Northampton National Bank, ante, 177.

See EVIDENCE.

Jones agt. New York Central and Hudson River Railroad, ante, 450.

NEW TRIAL.

1. An order sending the exceptions to the general term to be heard in the first instance does not suspend the entry of judgment, unless the order as entered also provides for the suspension of judgment upon the verdict. (*Douglass agt. Habestro, ante, 29.*)
2. The motion to be made in the general term is for a new trial on the exceptions, and all that court has power to do is to grant or refuse the motion. (*Id.*)
3. Where on a motion* for a new trial by one of the defendants, it appeared, as a question of law, that there could be no recovery as

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against such defendant, and that a new trial would not change the result:

Held, that the verdict should be set aside, and a nonsuit directed as to such defendant. (*Fitzgerald agt. Quann*, ante, 331.)

4. The entry of a final order granting a motion for a new trial on the minutes does not prevent the judge upon the same papers from listening to a rehearing on application of the defeated party, and making an order vacating the former final order, and deciding the motion the other way by denying it. (*Herzig agt. Metzger*, ante, 355.)

NEW YORK (CITY OF).

See SURROGATE.

The People ex rel. Rosekrans agt.

Carr, ante, 5.

The People ex rel. Rosekrans agt.

Carr, ante, 19.

The People ex rel. Rosekrans agt.

Carr, ante, 51.

See INCUMBRANCE UPON PIER.

The People agt. Macy, ante, 65.

NON-RESIDENT.

1. Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant (*Sec. 116, sub. 2*). (*Gotendorf agt. Goldschmidt*, 83 N. Y., 110.)

NONSUIT.

1. When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the for-

mer is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit. (*Painton agt. No. Cent. R. Co.*, 83 N. Y., 7.)

2. Although the plaintiff in an action fails to make out his cause of action, on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defense set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a nonsuit, not to a verdict. (*Briggs agt. Waldron*, 83 N. Y., 582.)

NOTICE.

1. An association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. (*Wachtel agt. Noah, etc., Soc.*, 84 N. Y., 28.)
2. *It seems* that in the absence of any agreement by the members or any provision in the charter or by-laws for a different mode of service, notice should be served personally. (*Id.*)

NOTICE OF JUDGMENT.

1. Where a paper, which bears on its back an indorsement of the title of the cause and statement that it is a copy, "certified order affirming order of reference," to which is inscribed the name of the attorney for respondent with the number of his office, and is addressed to and served on the attorney for appellant, and upon the face of the paper appears the certificate of the clerk of common pleas that the paper is an extract from the

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minutes of the court, and that it is a copy of an order made at the general term of the court:

Held, that these statements show that the order has been entered, and entered in the office of the clerk of common pleas, and is such a written notice of judgment as will limit the time to appeal. (*Devlin* agt. *The Mayor*, ante, 166.)

NOTICE OF TRIAL.

1. Where a party gives notice of trial, and then fails to try the cause pursuant to his notice or to countermand it in due season, he will be compelled to pay the opposite party who has omitted to notice the cause, but attends in obedience to the call of the party noticing, the costs of the term. (*Reversing S. C.*, 62 *How.*, ante. *Following Potter* agt. *Lewis*, 18 *Wend.*, 516, n.; *Townsend* agt. *Coven*, 19 *Wend.*, 639; 2 *Strange*, 797; 1 *Term Rep.*, 696). (*Seifert* agt. *Schüllner*, ante, 496.)

OFFICE AND OFFICER.

See SURROGATE.

The People ex rel. *Rosekrans*
agt. *Carr*, ante, 5.
The People ex rel. *Rosekrans*
agt. *Carr*, ante, 19.
The People ex rel. *Rosekrans*
agt. *Carr*, ante, 51.

ORDER.

See COSTS.

Havemeyer et al. agt. *Havemeyer et al.*, ante, 476.

ORLEANS (TOWN OF).

See TOWN BONDS.

Lee agt. *Board of Supervisors of Jefferson county*, ante, 201.

PARTIES IN INTEREST.

1. Where an action is brought for the recovery of real property by a grantee in the name of the grantor, under section 111 of the Code, against parties holding and claiming title adversely, and pending the action the grantee dies, such action may be continued with leave of the court in the name of the decedent's grantee or devisee, and for his or her benefit. (*Ward* agt. *Reynolds et al.*, ante, 183.)

PARTIES.

1. The testator, in his will, directed his executors "to apply" a portion of his estate "to such charitable institutions, which are under Protestant management, as my said executors, or a majority of them who may act as such, may choose."

Held (in this action to test the validity of this clause), that, though the question is one of difficulty, the bequest is valid, and should be enforced according to the directions of the testator; and the charitable institutions chosen by the executors from the class designated should be brought in as parties defendant (*Power* agt. *Cassidy*, 79 *N. Y.*, 327, applied). (*Gumble* agt. *Pfluger*, ante, 118.)

2. Prior mortgagees are not necessary parties to an action of foreclosure, but sometimes they are proper parties. (*Smith* agt. *Roberts*, ante, 196.)

See HUSBAND AND WIFE.

Fitzgerald agt. *Quann*, ante, 321

PARTITION.

See ANSWER.

Nolan agt. *Skelly*, ante, 102.

1. It seems that the provision of the Code of Civil Procedure (sec. 451),

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in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition. (*Bergen* agt. *Wyckoff*, 84 N. Y., 659.)

2. Where a plaintiff in an action for partition dies after argument at general term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the general term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. (*Id.*)

PERPETUATION OF TESTIMONY.

1. Where a bill was filed to obtain, under section 866 of the United States Revised Statutes, a direction that the testimony of a witness A. might be taken in *perpetuam rei memoriam*, alleging that complainant has been and still is using a certain process for which defendant has letters patent, that such letters patent are void for want of novelty, and in case suit shall be brought by defendant against plaintiff for infringement, the plaintiff relies for its defense upon the testimony of A., who had himself made use of the process years before the patent was issued, that A. is upwards of ninety years old, and that defendant neglects to bring such suit for infringement:

Held (overruling demurrer to bill), that the deposition, if taken, would be admissible in the suit which complainant fears, section 867 not being applicable to testimony perpetuated by direction of the United States circuit court under section 866.

Held, also, that there is a necessity for perpetuating this testimony, because, assuming the

United States attorney-general has power to institute a proceeding to annul the defendant's patent for want of novelty, still it rests with the attorney-general and not the plaintiff to say whether such proceeding shall be instituted, and whether A. shall be called as a witness. (*N. Y. and Balt. Coffee Polishing Co.* agt. *N. Y. Coffee Polishing Co.*, *ante*, 485.)

PLACE OF TRIAL

1. As an action under the manufacturing act (*sec. 15, chap. 40, Laws of 1848*), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (*Code of Civil Procedure, sec. 983*) and must be tried in the county where the cause of action or some part thereof arose. (*Veeder* agt. *Baker*, 83 N. Y., 156.)
2. As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. (*Id.*)
3. The right of the defendant in such an action to have the place of trial changed to the proper county, where the venue is laid in another, is an absolute one, and his motion to secure that right cannot be defeated by proof showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial as stated in the complaint. (*Id.*)
4. *It seems* that the proper practice in such case is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change

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is authorized by the Code (*sec.* 987), he must make his motion. (*Id.*)

5. In such an action where the venue had been laid in the wrong county defendant served with his answer a demand that the venue be changed to the proper county, and this not having been complied with, moved to change both on the ground that the wrong county was stated, and for the convenience of witnesses. Plaintiff demurred to one of the defenses set up in the answer. The demurrer and the motion were argued together, the former was overruled on the ground that the complaint did not state a cause of action, and the motion was denied. Plaintiff served an amended complaint; defendant answered, serving with his answer a new demand to change the place of trial to the proper county, this not having been complied with he moved to make the change, the motion was denied on the ground that a similar motion had been made and denied, and no leave to renew granted :

Held, untenable ; that as when the motion was first made the complaint stated no cause of action, the motion could, and it may have been denied on that ground, and when a sufficient complaint was served, defendant was entitled to make a new demand and another motion without leave of the court. (*Id.*)

PLEADINGS.

1. In the construction of pleadings regard must be had to the facts stated, and a pleading cannot be sustained upon implications, unless they necessarily follow from what has been alleged. (*Magauran* agt. *Tiffany*, ante, 251.)
2. Where a bond and mortgage is executed by one as executor and trustee and purports to be made in

such representative capacity, it is not necessary, in an action to foreclose such bond and mortgage, to allege that the mortgagor was in fact such executor and trustee, and the facts relating to his appointment as such.

Semble, that it is otherwise where one sues or is sued as an executor, and the action is brought to recover a debt due to or from a testator (*Kingsley* agt. *Stokes*, 25 *Hun*, 107.)

3. The court will not assume, merely from the pleadings, that an answer to a verified complaint was not verified, for the reason that the party answering "would be privileged from testifying as a witness concerning an allegation" contained in the complaint. (*Rouche* agt. *Kivlin*, 25 *Hun*, 150.)
4. *Semble*, that it is proper, when a defendant claims the right to serve an unverified answer to a verified complaint, that he should serve therewith an affidavit showing his excuse for not verifying his answer.

That in any event when a motion is made to set aside the answer, an affidavit should be made showing a valid reason why the answer is not verified. (*Id.*)

5. An answer denying "each and every allegation set forth in the complaint, except as herein admitted, qualified or explained," contains an authorized form of denial, and should not be stricken out as frivolous. (*Cathoun* agt. *Hallen*, 25 *Hun*, 155.)
6. Special demurrers as known to the former practice were abrogated by the Code ; and no pleading is now demurrable unless it is subject to one or more of the objections specified in the provisions of the Code, defining the grounds of demurrer. (*Code of Civil Procedure*, *secs.* 488 *et seq.* ; *Marie* agt. *Garrison*, 83 *N. Y.*, 14.)

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7. To sustain a demurrer to a complaint it is not sufficient that facts are imperfectly or informally averred, or that it lacks definiteness and precision, or that the material facts are argumentatively averred; it will be deemed to allege what can, by reasonable and fair intendment, be implied from the allegations. (*Id.*)
8. *It seems*, that the remedy for indefiniteness is not by demurrer but by motion (*Code of Civil Procedure*, sec. 546). (*Id.*)
9. The fact that there are allegations of fraudulent representations in a pleading, does not necessarily fix the character of the action as one *ex delicto*. (*Sparman agt. Keim*, 83 N. Y., 245.)
10. *It seems*, that a complaint in an action brought by a creditor against a stockholder of a corporation organized under the act authorizing the incorporation of gas-light companies (*chap. 37, Laws of 1848*) under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred. (*Briggs agt. Waldron*, 83 N. Y., 582.)
11. Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue" (*Code of Procedure*, sec. 275; *Code of Civil Procedure*, sec. 1207). (*Stevens agt. Mayor, &c.*, 84 N. Y., 296.)

PRACTICE.

1. The court will not compel a party who has himself noticed a case

for trial, but for some reason does not move it, to pay costs to another party who has not put himself in the same position. By noticing a case he keeps for himself control of it at the circuit. (*Siefert agt. Schillner*, ante, 97.)

2. If the plaintiff does not move after he has brought the defendant into court, he may be punished by a motion, under the Code, to dismiss the case for want of prosecution. But no similar remedy is given to the plaintiff where the defendant, having noticed the case for trial, does not move it when the case is reached upon the calendar. (*Id.*)

See ASSIGNMENT.

Matter of Schaller, ante, 40.

See REFERENCE.

Nolan agt. Skelly, ante, 102.

See ARBITRATION.

Ensign agt. St. Louis and San Francisco Railway Company, ante, 123.

See PROOF.

Ansonia Brass Company agt. Connor, ante, 272.

See ATTORNEY.

Matter of Husson, ante, 358.

3. An order having been made at a circuit putting off the trial of the action and requiring the defendant to pay costs, the parties, upon a notice served by the plaintiff, appeared before the clerk, who refused to tax the costs claimed by the plaintiff on the ground that his affidavits were defective. Thereafter the plaintiff upon new affidavits and upon notice to the defendant again applied to the clerk for a taxation of his costs:

Held, that the power of the clerk was exhausted on the first application, and that he had no power to entertain the second application without a special order

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of the court. (*Larkin* agt. *Steele*, 25 *Hun*, 254.)

4. Under section 780 of the Code of Civil Procedure a county judge cannot make an order, requiring a party to show cause why an application should not be granted, which is returnable in less than eight days at a special term of the supreme court. An order shortening the term of service can only be made by the court before which the order is returnable, or a judge thereof. (*Id.*)

5. No appeal lies to the general term from an order of a county court, granting leave to issue an execution upon a judgment recovered in a justice's court, where a transcript thereof was filed and judgment thereon docketed in the clerk's office of the county in 1866. (*Kincaid* agt. *Richardson*, 25 *Hun*, 237.)

6. The sections of the Code of Civil Procedure (*secs.* 376, 382, *sub.* 7) prescribing the times within which actions upon judgments must be brought, relate only to the remedy by action and do not affect the remedy by execution. (*Id.*)

7. A plaintiff recovered a judgment in a justice's court and the defendant appealed, stating in his notice of appeal, as the ground thereof, "that the judgment should have been in favor of the defendant and against the plaintiff for costs." No offer was made by the plaintiff, and upon the trial the judgment was reduced forty dollars:

Held, that the Code did not require the appellant to state in his notice of appeal the exact amount of the error in the judgment, and that he was entitled to recover his costs. (*Chamberlain* agt. *Chamberlain*, 25 *Hun*, 199.)

8. Where a judgment in favor of the plaintiff, for so small an

amount as to entitle the defendant to costs, is reversed on appeal, costs to abide the event, and a new trial is granted on which the plaintiff obtains a judgment sufficient to entitle him to costs, he is entitled to costs as well of the first trial as of the appeal and the new trial. (*Carpenter* agt. *Manhattan Life Ass. Co.*, 25 *Hun*, 194.)

9. Where an attachment is issued and property is levied upon thereunder, in an action against defendants, who, after the commencement of the action, become bankrupt, and for whom curateurs or assignees are appointed by a tribunal of a foreign nation having jurisdiction in the matter, it is proper to bring such curateurs or assignees, upon their own motion, into the action as additional parties defendant. (*Lee* agt. *Pfeffer*, 25 *Hun*, 97.)

10. The words "within four years before the sale," as used in section 2798 of the Code of Civil Procedure, and the words "making of the sale," in chapter 834 of the Laws of 1871, relating to the payment into the proper surrogate's court of surplus money arising on the sale of real property, if letters testamentary or of administration have been issued within a certain time, refer to the date of the sale and not to the commencement of the action or proceedings resulting in the sale. (*White* agt. *Poillon*, 25 *Hun*, 69.)

11. *Semble*, that an appeal does not lie to the general term from an interlocutory judgment, to the effect that the plaintiffs have judgment unless the defendants who have interposed a demurrer answer over within twenty days, etc. (*Trust and Deposit Co.* agt. *Pratt*, 25 *Hun*, 23.)

12. On an application for an injunction, facts as to which the complaint does not contain any allegations, must not be alleged in the

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affidavits, as the affidavits are to be considered only as evidence in the allegations made in the complaint. (*Stull* agt. *Westfall*, 25 *Hun*, 1.)

13. An injunction will be denied where it is asked not to restrain the doing of an act, but the doing of the act to the injury of the plaintiff; such injunction will be denied because of the inconvenience of enforcing an injunction, for every alleged breach of which a trial must be had in order to determine whether the act was or was not injurious to the plaintiff. (*Id.*)
14. Where, in an action tried at the circuit, before the court and a jury, a nonsuit has been granted, the court cannot, since the passage of the Code of Civil Procedure, order the exceptions to be heard in the first instance at the general term. (*Seely* agt. *N. Y. C. and H. R. R. Co.*, 25 *Hun*, 280.)
15. Where, in an action brought to foreclose a mortgage, the defendant, without denying any of the allegations of the complaint, alleges in his answer that a payment has been made upon the bond and mortgage, the plaintiff may admit the payment and move upon notice, under section 511 of the Code of Civil Procedure, for leave to enter judgment for the balance due under the allegations of the complaint, after deducting the payment. (*Hall* agt. *Holt*, 25 *Hun*, 277.)
16. An action brought by a grantee in the name of his grantor, against one who at the time of the execution of the deed was in possession of the premises under an adverse claim of title, does not abate by the death of the grantee, but the same may be revived and continued by his devisees. (*Ward* agt. *Reynolds*, 25 *Hun*, 385.)
17. Where an application by the devisee for leave to continue the action is denied, he may take an appeal from the order denying his motion, in the name of the plaintiff of record. (*Id.*)
18. It is not customary for the court to deny an application for leave to serve a supplemental answer upon the ground that the facts sought to be set forth therein do not constitute a defense to the action. (*Mitchell* agt. *Allen*, 25 *Hun*, 543.)
19. Where, in an action brought to foreclose a mortgage, issues involving the question of usury, which is interposed as a defense, have been framed and tried by a jury, the court may in its discretion, upon the case being brought on for trial before it, adopt the verdict and refuse to receive any further evidence as to the facts averred by it. (*Madison University* agt. *White*, 25 *Hun*, 490.)
20. The bringing of an action upon a judgment recovered in the supreme court of this state without first obtaining the leave of the court so to do, as required by section 71 of the old Code, is not a mere irregularity which is waived by the omission of the defendant to raise the objection, but the omission to obtain such leave renders the judgment invalid and the same will be set aside upon the application of the administrator of the deceased judgment debtor, made sixteen years after the entry of the said judgment. (*Farish* agt. *Austin*, 25 *Hun*, 430.)
21. An answer denying "each and every allegation set forth in the complaint, except as herein admitted, qualified or explained," contains an authorized form of denial, and should not be stricken out as frivolous. (*Calhoun* agt. *Hallen*, 25 *Hun*, 155.)
22. It is not essential that the examination under oath, which the

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- surrogate is authorized to make before issuing letters of administration, should be embodied in a verified petition. (*Johnston* agt. *Smith*, 25 *Hun*, 171.)
23. A writ of error will not lie in a criminal case until all the issues have been disposed of and a final judgment has been entered. (*Tabor* agt. *People*, 25 *Hun*, 638.)
24. *It seems* that the proper practice where the venue in a local action is laid in the wrong county is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (*sec.* 987), he must make his motion. (*Veeder* agt. *Baker*, 83 *N. Y.*, 156.)
25. Where, upon pendency of appeal to this court from order denying motion to change venue, plaintiff moves cause for trial and takes judgment, a motion to set aside the judgment should be made in the supreme court. This court has no jurisdiction of it. (*See Veeder* agt. *Baker*, 83 *N. Y.*, 163.)
26. Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. (*Leonard* agt. *Col. St. Nav. Co.*, 84 *N. Y.*, 48.)
27. The provision of the Code of Civil Procedure (*sec.* 17) authorizing a convention of the general term justices and the chief judges of the superior court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code. (*Formerly* agt. *McGlynn*, 84 *N. Y.*, 284.)
28. The provisions of said Code (*sec.* 1023) fixing and determining the practice as to the findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of Rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. (*Id.*)
29. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed, an exception should be taken. (*Muldoon* agt. *Blackwell*, 84 *N. Y.*, 646.)
30. *It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the general term, it is not correct practice for respondent's attorney to return the case, and upon failure to serve others, to enter order dismissing appeal. (*Bliss* agt. *Hoggson*, 84 *N. Y.*, 667)
31. *It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed. (*Id.*)
32. Where, in a suit brought in 1877, upon a judgment obtained in 1858, a motion for leave to set up by supplemental answer an order granted in 1881, under section 1268 of the Code, canceling and discharging the judgment, was denied, upon the ground that it was an attempt to set up defend-

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ant's discharge in bankruptcy, application for which had twice been refused, on the ground of laches, and that the denials of the former motions were *res adjudicata*:

Held, that this was error, the last application not being the same as that which had been heard and decided before; and the order canceling the record had so changed the position of the parties to the action that the leave asked should have been granted on terms. (*Townsend* agt. *Simpson*, ante, 506.)

PREFERENCE.

1. Where the right to a preference does not appear in the pleadings, the order giving the preference should be obtained *before* notice of trial, and should be served either *before* or *with* the notice. (*Robertson* agt. *Schellhaas*, ante, 489.)
2. Where a plaintiff first notices the cause for trial, without having obtained the preliminary order as required, he waives his right to a preference. (*Id.*)
3. Where the right to a preference depends upon facts which do not appear upon the pleadings, a copy of the order granting the preference must be served with or before the notice of trial or argument. (*City National Bank of Dallas* agt. *National Park Bank*, ante, 495.)
4. By serving a notice of trial before making a motion to have the cause preferred, the right to such preference is waived. (*Id.*)

PROOF.

1. As the complaint, which alleged that the plaintiff "is a corporation duly created and existing, doing business in the city of New

York," did not aver that the plaintiff was a corporation created under a statute of New York, and the answer put in issue the existence of the corporation, proof should have been given of the corporate character of the plaintiff. (*Ansonia Brass Company* agt. *Conner*, ante, 272.)

2. The allegation of the complaint that the plaintiff had recovered a judgment against one Wilson being denied by the answer, and the fact being essential to the existence of the cause of action, the court erred in directing judgment on the pleadings. (*Id.*)

See EXCISE LAW.

Hess agt. *Appell*, ante, 313.

QUESTION OF FACT.

1. Under an indictment for an assault with intent to do bodily harm with a sharp, dangerous weapon (*chap. 74, Laws of 1854*), a conviction can be had of an assault, but not assault and battery. (*The People* agt. *Cavanagh*, ante, 187.)
2. What is a sharp, dangerous weapon within the meaning of that statute, is a question of fact. (*Id.*)

RAILROAD CORPORATIONS.

See ELEVATED RAILROADS.

Matter of Brooklyn Rapid Transit Company, ante, 404.

RECEIVER.

1. The proceedings authorized by chapter 537 of 1880, as amended by chapter 639 of 1881, for the removal of receivers of insolvent corporations, only apply to such receivers as are by statute required to make and file reports of their proceedings at certain defi-

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nite and prescribed times. (*Attrill agt. Rockaway Beach Imp. Co.*, 25 *Hun*, 502.)

2. When any proceeding thereunder is instituted by the attorney-general, it must be shown that the party of whose property a receiver has been appointed is a corporation and that it is insolvent. (*Id.*)

3. Where an action has been brought by a stockholder and creditor to close up the business of a corporation, and a receiver of its property has, with the consent of all its directors and stockholders and of many of its creditors, been appointed, notice of a motion by the attorney-general under the said acts for the removal of the said receiver should be served upon all the parties who have appeared in the action, and it is improper to remove such a receiver and appoint another in his place when notice of the motion has been served upon the receiver alone. (*Id.*)

4. The plaintiff brought this action in March, 1880, against the defendant, as receiver of the Erie Railway Company, to recover for services rendered to him from December 1, 1875, to January 31, 1877. More than sixty days prior to the commencement of this action all the property and franchises of the old company had been sold, and the purchasers had, pursuant to chapter 430 of 1874, formed a new corporation and the defendant had been discharged from his receivership. By these facts the plaintiff was, under section 3 of chapter 446 of 1876 prevented from maintaining the action against the receiver, but the new company was thereby subjected to the same liability as had formerly existed against him:

Held, that it was proper to allow the plaintiff to amend the summons and complaint by striking out the name of the defendant and substituting that of the new cor-

poration, although issues had been joined in the action and sent to a referee for trial, but that as the reference had been ordered by consent that it should be vacated. (*Abbott agt. Jewett*, 25 *Hun*, 603.)

5. Chapter 537 of 1880, providing means for compelling receivers of insolvent corporations to make and file reports, applies only to such receivers as are appointed in proceedings instituted under title 4 of chapter 8 of part 3 of the Revised Statutes, who are, by chapter 348 of 1858, required to make and file quarterly reports of their proceedings. It has no application to receivers of insolvent corporations appointed in one of the additional cases defined and declared in chapter 151 of 1870. (*Attrill agt. Rockaway Beach Improvement Co.*, 25 *Hun*, 376.)

6. A receiver of an insolvent corporation appointed under subdivision 4 of section 3 of chapter 151 of 1870, in the first judicial district, in an action there pending, cannot be removed upon an application made in the third judicial district. (*Id.*)

7. Even when a court in one judicial district has power, under chapter 537 of 1880, to remove a receiver appointed in an action pending in another judicial district, it has no power under the said act to appoint his successor. To accomplish that end, the proceedings must be remitted to the district in which the action is pending. (*Id.*)

8. A receiver appointed in such an action should not be removed without notice of the application having been given to the plaintiff in the action, at whose instance he was appointed. (*Id.*)

9. By the appointment of a receiver in a foreclosure suit the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the

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equity of redemption has a right to receive the rents and cannot be compelled to account for them. (*Rider agt. Bagley*, 84 N. Y., 461.)

10. *It seems* that, assuming the court has power to compel such owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. (*Id.*)

11. So, also, where fraud or contempt upon the supreme court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. (*Id.*)

REFEREES.

1. *It seems*, that in a proper case the court has the power and will direct the same to be tried before three referees. (*Devlin agt. The Mayor*, ante, 260.)

2. A referee appointed in supplementary proceedings suing for fees will not be permitted to show that property was discovered upon the examination, or that the judgment was in consequence paid. His action is upon the statute, and although the answer denies the the rendition of any service, such evidence is improper, as it may unjustly influence the jury. (*Riddle agt. Cram*, ante, 493.)

See ASSIGNMENT.

Matter of Schaller, ante, 40.

REFERENCE.

1. An answer in a partition suit which alleges that the defendant, one of the tenants in common, owns the lot adjoining one of the lots sought to be partitioned; that their father, from whom estate comes in his lifetime, caused to

be erected a two-story and basement building with stone foundation, partly on defendant's own lot and one of the lots involved in such suit, without authority so far as defendant's lot was concerned, and asking to be awarded full possession of his lot and for \$500 damages is a nullity, and the usual order of reference as upon default is proper. (*Nolan agt. Skelly*, ante, 102.)

2. Where a cause is referred by consent of parties, and the referee dies, it puts an end to the reference, because the extent of the consent is that the cause may be tried and decided by the particular person whom they have agreed upon as a referee. (*Devlin agt. The Mayor*, ante, 163.)

3. But where the cause is referable in its nature, and has been referred by the court, upon motion, the only effect that the death of the referee before the termination of the reference has is, that nothing has been accomplished, and that a new referee must be appointed, before whom the trial of the cause has to be begun again. (*Id.*)

4. After the trial has commenced before the substituted referee, the court has power, on motion, to increase the number of referees to three. (*Id.*)

5. The supreme court has no power to grant an order, on application of the referee in an action, requiring the plaintiff to pay the referee's fees and take up the report. (*Geib agt. Topping*, 83 N. Y., 46.)

6. *It seems* that as referees act voluntarily, their rights are to be enforced according to the principle of the law of contracts. (*Id.*)

7. *It seems*, also, that a referee is not bound to part with his report without payment of his legal fees,

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and when he has his report ready within the statutory time and offers to deliver it on payment of such fees, the offer will be deemed a sufficient delivery to prevent a forfeiture of fees declared by section 1019 of the Code of Civil Procedure. (*Id.*)

8. Where the findings of fact by a referee conflict, the defeated party is entitled to those most favorable to him, and may rely upon them in aid of exceptions to the referee's conclusions of law. (*Schwinger* agt. *Raymond*, 83 N. Y., 152.)

9. Where findings contained in the case, as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand (*Code of Civil Procedure*, sec. 997). (*Id.*)

10. This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them, in fraud of the rights of the lunatic :

Held, that the action being for an accounting was referable ; that the allegations of fraudulent conspiracy did not change its character ; and that an order of reference was not reviewable here. (*Harrington* agt. *Bruce*, 84 N. Y., 103.)

REMEDY.

1. Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. (*Leonard* agt. *Col. S. Nav. Co.*, 84 N. Y., 48.)

REMOVAL OF CAUSE.

1. Where in an action triable in Erie county, an order for its removal into the circuit of the United States, under the law of congress of 1875, was made on November 11, 1880, in the county of New York, without notice, and two days later an order was granted in Erie county, referring the action and appointing a receiver :

Held, that under the construction which has been given to this act of congress, the application for the order of removal was regular, even though no notice of it was given to the attorneys of the plaintiff. (*Erisman* agt. *Pidcock*, ante, 327.)

2. As it was regularly made without a service of notice, the order could be properly made, as it was, by a special term other than in the county where the venue was laid. (*Id.*)
3. It is only when special bail is originally requisite in the action that the bond executed is required to include a condition for the entering of such bail. (*Id.*)
4. After the order had been entered in Erie county and served, the court had no authority to proceed further in the action. (*Id.*)
5. The order afterwards made for a reference and receiver was entirely unauthorized, and though void, a motion to vacate it was proper. (*Id.*)

REPLY.

1. Though failure to reply, in a case where a reply is necessary under the Code, does not prevent the party from bringing his cause on for trial, yet a motion by plaintiff to place the cause on the special circuit calendar was prop-

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erly denied, for the reason that plaintiff had not served a reply, because the counter-claim being admitted there was no issue, the only question being as to the amount of damages. (*Adams* agt. *Roberts*, ante, 253.)

REVIVAL OF ACTION.

1. When an action was commenced by A. against B. to foreclose a mortgage, and, after *lis pendens* filed, B. conveyed the premises to C., and thereafter B. died and C. was made administrator of B., the action was revived and continued against C. as administrator, and a decree of foreclosure and sale was entered:

Held, that the action was properly revived. Under section 1671 of the Code of Civil Procedure, C., as a grantee subsequent to the filing of the *lis pendens*, is bound by all the proceedings in the action to the same extent as if he were a party and his equity of redemption was cut off by the decree. (*Weyh* agt. *Boylan*, ante, 397.)

2. Whether a judgment *in personam* for deficiency could be entered against C., *quære?* (*Id.*)

RIGHT OF WAY.

1. Where, after the owner of two adjoining premises, one being an extension in the rear of the other, had established a communication between the front and rear buildings, with an entrance thereto through the front building, the two buildings were sold upon foreclosure of mortgages, the defendant purchasing the front building and the plaintiff that in the rear, and then the defendant closed up the entrance in the hallway between the premises purchased by him and the rear building adjoining:

Held (in a suit by plaintiff for

relief), that the case is not one entitling plaintiff to equitable interference. (*Schrymser* agt. *Phelps*, ante, 1.)

RULES.

1. Notwithstanding the provisions of the Code of Civil Procedure (*sec.* 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, &c. (*Taylor* agt. *Wing*, 83 *N. Y.*, 527.)
2. The provisions of the Code of Civil Procedure (*sec.* 17) authorizing a convention of the general term justices and the chief judges of the superior court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary, and as are in harmony with the provisions of the Code. (*Formerly* agt. *McGlynn*, 84 *N. Y.*, 284.)
3. The provisions of said Code (*sec.* 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of Rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. (*Id.*)

SAVINGS BANK.

See CONTRACT.

Muleahy agt. *Emigrant Industrial Savings Bank*, ante, 463.

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SERVICE.

1. Where a person comes from another state to attend a meeting of creditors at the office of a register in bankruptcy, as a creditor and witness, to prove certain claims, or even as a party or as an attorney for other parties, he is privileged from service of process or summons while so attending. (*Mathews* agt. *Tufts*, ante, 508.)

SHERIFF.

1. A bond of indemnity given to the sheriff applies to a levy made before the bond was given; and the defendant, in a suit by the sheriff upon the bond, is charged with the knowledge of the prior levy and sale by the giving of the bond, unless he gives affirmative proof upon the trial of ignorance of those facts. (*Reilly* agt. *Coleman*, ante, 289.)
2. Where a defendant, after arrest, has been allowed to go at large after giving an undertaking, the sheriff becomes liable as bail until the sureties in the undertaking justify and are approved by the court. (*Watt* agt. *Reilly*, ante, 350.)
3. Where at the time a *supersedeas* is granted, the defendant is still at large and the sureties have not justified, the sheriff is still liable as bail and can only be exonerated from that liability in the same manner as ordinary bail. (*Id.*)
4. Although the *supersedeas* might have been a protection to the sheriff as long as it remained in force, yet, when the court, at general term, reversed the order allowing the *supersedeas*, the liability of the sheriff as bail revived. (*Id.*)
5. In an action against a sheriff to enforce his liability as bail, where it was objected that the plaintiff

failed to establish the liability of the sheriff as bail, for the reasons that neither of the executions were tested, and the body execution did not specify the time when it was returnable:

Held, that, though the executions to have been regular should have been tested, and the body execution should have been made returnable within sixty days after its receipt by the sheriff, the omissions were mere irregularities which did not render the executions void. (*Douglass* agt. *Habestro*, ante, 455.)

6. *It seems* questionable whether the omission of the teste made them even voidable:

Held, further, that the irregularities are such as might have been amended under section 723 of the Code of Civil Procedure. (*Id.*)

7. The party against whom the executions were issued not having availed himself of such defects, the sheriff cannot take advantage of them. (*Id.*)
8. After the sheriff has by his deputy treated the executions as regular and acted under and made returns to them, he cannot afterwards question their validity. Proof that the executions were returned by the direction of the plaintiff's attorney, in order that the service thereof might be prevented, is not admissible under a specific or general denial; they constitute or tend to constitute an affirmative defense, and cannot be proved unless pleaded. (*Id.*)
9. The provision of the Revised Statutes permitting a public officer, when sued for an official act, to give special matters in evidence under the general issue (2 *R. S.*, 353, secs. 14, 15), is no longer in force. (*Id.*)
10. An allegation in the amended answer that "the executions were

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returned by the deputy having the same in charge, at the request and by the direction of the attorney of the plaintiff in said executions, without the knowledge, privity or consent of defendant (the sheriff)," does not constitute a defense under section 599 of the Code of Civil Procedure. (*Id.*)

11. The return of the execution by the deputy or under sheriff before the return day was the act of the sheriff, and was entirely voluntary on his part for aught that is alleged in the answer, and it constitutes no defense, either under the statute or independently of it. (*Id.*)

12. A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (*sec. 184, subd. 4*), and an advertisement of the premises for sale is a "seizure" within said provision. (*Union Dime Savings Institution* agt. *Anderson*, 83 N. Y., 174.)

13. Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired :
Held, that he had authority and was bound to proceed with and complete the sale. (*Id.*)

14. Where in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor :

Held, that the fact that the sheriff failed to make a valid levy by virtue of the execution did not

destroy or weaken the effect of the proof in mitigation ; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection ; in either event, while the attachments remained in force, plaintiff was only entitled to nominal damages. (*Wehle* agt. *Conner*, 83 N. Y., 231.)

STAY OF PROCEEDINGS.

1. Where plaintiff brought an action against defendant D., in another state, and then brought this action against him with others for the same relief, he should be compelled to elect which he will first prosecute, and to stipulate to stay proceedings in the other. (*Bell* agt. *Donohue*, *ante*, 356.)

See ARBITRATION.

Ensign agt. *St. Louis and San Francisco Railway Co.*, *ante*, 123.

STIPULATION.

1. Where an order of arrest is vacated upon the defendant stipulating not to sue for false imprisonment or malicious prosecution, and the plaintiff ultimately succeeds in the action, such condition and stipulation go to the extent of precluding the defendant from maintaining any action upon the undertaking filed upon obtaining the order of arrest. (*Schuyler* agt. *Englert et al.*, *ante*, 479.)

2. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. (*Briggs* agt. *Waldron*, 83 N. Y., 582.)

STOLEN COUPONS.

1. Where coupons of railroad bonds, which had been stolen in this

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country, were purchased after maturity in Frankfort-on-the-Main, and sent here for collection, and this action was brought by plaintiff, who owned the coupons at the time they were stolen, to restrain payment to the purchasers by the railroad company:

Held, that under the law of this state, though there is nothing to impeach the good faith of the purchasers, that transaction, the coupons being overdue, cannot avail to invest them with a title without the assent of the plaintiff, the true owner, from whom they were stolen; and her title to the coupons is unaffected by such purchase. The law and usage prevailing at Frankfort being in conflict with the law of New York upon this subject, the latter must prevail, the plaintiff and one of defendants being residents of New York, and the property itself, the subject of the action, being brought within this jurisdiction. (*Wylie* agt. *Speyer*, ante, 107.)

STREETS.

See MUNICIPAL CORPORATIONS.

Goff agt. *Nolan*, ante, 323.

SUMMARY PROCEEDINGS.

1. Where a tenant knowingly sublets a portion of the demised premises for a policy shop, the lease of the tenant may be annulled by the landlord, and the tenant may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an overholding tenant. (*The People ex rel. Shaw* agt. *McCarty et al.*, ante, 152.)

2. The principles laid down in same case reported in 59 Howard's Practice, 487, sustained. (*Id.*)

See ATTORNEY.

Matter of Husson, ante, 358.

SUMMONS.

1. Where a person comes from another state to attend a meeting of creditors at the office of a register in bankruptcy, as a creditor and witness, to prove certain claims, or even as a party or as an attorney for other parties, he is privileged from service of process or summons while so attending. (*Mathews* agt. *Tufts*, ante, 508.)
2. Under the provision of the Code of Civil Procedure (*sec. 426, sub. 3*) which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge; when a sheriff has an office in the city or village where the county courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 R. S., 285, *sec. 55*); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. (*Dunford* agt. *Weaver*, 84 N. Y., 445.)
3. Under the Code of Civil Procedure (*sec. 426*), to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons, within the state, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient. (*Ingersoll* agt. *Mangam*, 84 N. Y., 622.)
4. *It seems* that the provision of the Code of Civil Procedure (*sec. 451*) in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by

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publication, including actions for partition. (*Bergen* agt. *Wyckoff*, 84 N. Y., 659.)

See INFANTS.

Bellamy agt. *Guhl*, ante, 460.

SUPPLEMENTARY PROCEEDINGS.

1. Where order in supplementary proceedings made in district where venue was laid and roll filed, appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides; such justice has power to change referee, and the exercise of this power is discretionary and not reviewable here. (*See Pardee* agt. *Tilton* [*Mem.*], 83 N. Y., 623.)

SUPREME COURT.

1. Has no power to let to bail one charged with petit larceny. (*See People ex rel.* agt. *Dutcher*, 83 N. Y., 240.)

SURROGATE'S COURT.

1. An omission in proof of a matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed. (*Dunford* agt. *Weaver*, 84 N. Y., 445.)
2. Under the provisions of the act of 1867 (*sec. 8, chap. 782, Laws of 1867*) in relation to surrogates' courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts. (*Id.*)
3. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment (2 R. S., 221, *sec. 6, sub. 4*). (*Id.*)
4. It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed. (*Id.*)
5. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*. (*Id.*)
6. The probate of a codicil to a will was contested, both on the ground of want of due execution, and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The general term upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate:
Held, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence. (*Dack* agt. *Dack*, 84 N. Y., 663.)
7. Upon reversal on appeal on the law to general term from decree of surrogate of county of New York, establishing lost or destroyed will, it is proper to remit proceedings to surrogate, and costs should be awarded against respondent. (*See Sheridan* agt. *Houghton* [*Mem.*], 84 N. Y., 643.)

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SURROGATE.

1. By the Constitution of 1846 (*art. 6, sec. 14*), the office of county judge for every county in the state except the city and county of New York, was created, and the person elected thereto was to hold it for four years. The same section and article of the Constitution, without prescribing the term and duration of the office of surrogate, provided: "In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to perform the duties of surrogate." By chapter 448 of the Laws of 1847, the legislature provided for the election of surrogate (also a recorder) of the city and county of New York. The first election of such officer was to take place in November, 1848, and the term of office was to be "three years from the first day of January next after said election." The act also provides that in case a vacancy occurred "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had become so vacant." By chapter 292 of the Laws of 1869, it was provided, that "the term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York, shall be six years." In 1869, article 6 of the Constitution was then changed and altered in many particulars. By section 15 of that article, it is now provided: "The existing county courts are continued, and the judges thereof in office at the adoption of this article, shall hold their offices until the expiration of their respective terms. Their successors shall be chosen

by the electors of the counties for the term of six years. * * *

The county judge shall also be surrogate of his county; but in counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge." At the general election held in November, 1875, V. S. was elected surrogate in place of H., whose term of office was to expire on the 31st day of December, 1875. Had V. S. lived, his term of office would have expired January 1, 1882. He died in April, 1876, and on the twelfth of the same month C. was appointed to fill the vacancy by the board of aldermen of New York, acting as supervisors. At the general election held in November following, C. was elected surrogate by the electors of the city and county of New York:

Held, 1. That the election of C. to the office of surrogate at the general election in November, 1876, entitles him to hold the office for the full term of six years from January 1, 1877.

2. That the act of 1869 is repugnant to and inconsistent with the act of 1847, not only as to the general term of the office, but also to so much of that law as provides that the election, when a vacancy has occurred other than by the expiration of the full term, shall only be for the unexpired term, and consequently repeals that of 1847 in both these particulars, and while not rendering the election to fill the office unnecessary, it changes the effect thereof, so as to confer a full and not a broken term.

3. That the act of 1869 and the constitutional enactment (*art. 6, sec. 15*), which was adopted in 1869, effectually and clearly provide that an election by the people to the office of surrogate, can only be for the term of six years; and that consequently the term of

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Mr. C., as surrogate of the city and county of New York, will not expire until January 1, 1883, and that the secretary of state was right in omitting to give notice of any election to fill that office at the coming November election.

4. That the constitutional provisions, as amended in 1869, apply to the surrogate of the city and county of New York. (*The People ex rel. Rosekrans agt. Carr, ante, 5.*)

2. A vacancy occurring in the office of surrogate of the county of New York by the death of one V. S., who had been elected at the general election in November, 1875, and whose term of office would have expired January, 1882, but who died in April, 1876, and on the twelfth of the same month C. was appointed to fill the vacancy by the board of aldermen of New York, acting as supervisors. At the general election held in November following, C. was elected surrogate by the electors of the city and county of New York:

Held—1. That the election of C. to the office of surrogate at the general election in November, 1876, only entitles him to hold the office for the unexpired term of V. S., which will terminate with the year 1881.

2. That the act of 1869 simply enlarged the term of office to six years, leaving in full force the provisions of the act of 1847, for filling vacancies caused by death, resignation or otherwise.

3. That the constitutional provisions as amended in 1869 do not apply to the surrogate of the city and county of New York.

4. That Mr. C., under the existing provisions of the constitution and the statutes relating to the office of surrogate, is only entitled to hold said office for the unexpired term of V. S., which will terminate with the year 1881 (*Reversing S. C., ante, 5.*) (*The*

People ex rel. Rosekrans agt. Carr, ante, 19.)

3. The act of 1869 (*Laws of 1869, chap. 282*), which provides that "the term of office of the persons who shall hereafter be elected to the office of recorder, city judge and surrogate, respectively, in the city and county of New York, shall be six years," *does not repeal* the third section of the act of 1847 (*Laws of 1847, chap. 488*), which provides that "in case a vacancy shall occur in either of said offices" (recorder or surrogate of the city and county of New York) "by death, resignation or otherwise, the board of supervisors of said city and county are authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election shall be had to fill the unexpired term of the officer whose term had so become vacant." (*The People ex rel. Rosekrans agt. Carr, ante, 51.*)

4. The provisions of section 15 of article 6 of the constitution, as amended in 1869 with reference to county judges and surrogates in counties having a population of over 40,000, do not refer or apply to the city and county of New York. This provision applies only to the counties (other than the city and county of New York) wherein there are courts known as the county court, and judges known as the county judge, and the office of surrogate of the city and county of New York is not held under section 15 of article 6, but is a local office established especially for that city, under pre-existing laws, and recognized and continued by section 12 of article 14 of the constitution, and the term of that office is left wholly under the control of the legislature. (*Id.*)

5. Where C., the present incumbent of the office of surrogate of the city and county of New York, was

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appointed on the 12th day of April, 1876, by the board of aldermen of New York, acting as supervisors to fill a vacancy occasioned by the death of V. S., whose term of office, had he lived, would have expired January 1, 1882, and at the general election held in November following the said C. was elected surrogate by the electors of the city and county of New York:

Held, that such election only entitled C. to hold the office for the unexpired term of V. S., deceased, and not for the full term of six years, and consequently his term of office would expire December 31, 1881 (*Affirming S. C., ante*, 19). (*Id.*)

TENANTS IN COMMON.

1. One tenant in common of personal property may maintain trover against his cotenant for his undivided one-half of such property. (*Potter agt. Neal, ante*, 158.)
2. Where the fact showed that the plaintiff was the owner of an undivided one-half of certain cattle, and that it was agreed as a part of the contract between the parties, that before the defendant moved away from the plaintiff's farm the cattle should be divided between them, and they should not be removed until divided, and that afterwards, when the defendant's contract was ended and his term closed for occupying the farm, against the demands and requests of the plaintiff to divide the stock and distribute it in accordance with their agreement, the defendant drove the stock away to another farm whereto he removed, and after repeated requests by the plaintiff to divide the stock or to account to the plaintiff, or pay him for his share, the defendant refused and denied all the plaintiff's right, interest or share in the stock, and denied

that the plaintiff had any title to the stock to which he was entitled to a division, and locked up the stock in his barn and converted it to his sole use, benefit and purposes, in denial of all the rights title and interest of the plaintiff, and that the defendant intended thereby to prevent the plaintiff from having any right, title, interest or share in the cattle:

Held, that a case is made of such a conversion of the plaintiff's interest in the stock, such a destruction or loss of his rights and interests as would entitle the plaintiff to recover of the defendant in this action. (*Id.*)

TITLE.

See JUDGMENT.

Weidersum et al. agt. Naumann et al., ante, 369.

TOWN BONDS.

1. Some years ago the town of Orleans, Jefferson county, issued bonds to the amount of \$80,000 in aid of the Clayton and Theresa railroad; \$70,000 of these bonds were sold to Nathan E. Platt, of Chicago. Since 1874 the town has contested payment of the bonds in the United States courts, the case at one time being carried into the United States supreme court. The bonds were held good, and in accordance with this decision the board of supervisors of Jefferson county two years ago levied on the town \$10,000, and last year \$18,000. Five judgments, amounting to between \$17,000 and \$18,000, were to be provided for by the board this year, when the plaintiff Lee, a taxpayer in the town of Orleans, brought suit against the board, and a temporary injunction was granted restraining the board from levying the tax or from adjourning until the case was decided.

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Nathan E. Platt, upon affidavits and upon a copy of the record of the United States supreme court judgments, wherein Nathan E. Platt was plaintiff and the town of Orleans, Jefferson county, defendant *ex parte*, applied to have the injunction order dissolved, which application resulted in the order to show cause, which, in effect, asks that Platt be made a party defendant herein instant, and that the plaintiff herein be required to amend the summons and complaint by inserting the name of said Platt as an additional party defendant, and to make such amendments to the pleadings as shall be necessary to effect such purpose, and why the injunction should not be dissolved, or that Platt have such order or relief in the premises as may be proper :

Held, first. That as the defendant, the board of supervisors, is a nominal party, having no pecuniary interest in the question for the determination of which this action was brought, and a determination of the questions raised by the plaintiff in his favor would be prejudicial to the rights and interests of Nathan E. Platt, it would, in effect, stay and defeat the collection of the several judgments recovered by him against the town of Orleans in the United States courts, and he is therefore a necessary and proper party, and should be brought as such before the court before the trial and determination of the question raised by the complaint and papers presented.

Held, second. That all the questions in the case having been decided by the United States circuit court and the United States supreme court, when the entire town of Orleans was a party to the suit, Lee, a single tax-payer, cannot maintain an action.

Held, third. That the judgments of the United States court conclusively establish an indebtedness on the part of the town of Orleans

to Platt, the holder of the bonds and coupons, and as against the town he is entitled to issue an execution and satisfy the judgments out of any property belonging to the defendant in those actions, and as against the town he is entitled to avail himself of the statutory provisions enacted for the purpose of facilitating the collection of judgments rendered against the town.

Held, fourth. The Revised Statutes (vol. 1, page 558, sec. 8) declares in terms, "judgments recovered against a town shall be a town charge." The judgments recovered by Platt, by virtue of that provision of the statute, are declared to be a town charge, and being a town charge, they fall within the provisions constituting the machinery for the collection of town charges, to wit: Assessment and levy upon the taxable property within the territory of the township.

Held, fifth. That the statute of 1881, known as an act for the protection of taxpayers (*Laws of 1881, chap. 531*), does not apply to the case in hand. It was passed to prevent fraudulent recoveries of judgments by default or by collusion, not for the purpose of giving every taxpayer within the limits of the town the right to litigate afresh questions fairly, fully and honestly presented by way of defense and solemnly adjudicated adversely to the town.

Held, sixth. That notwithstanding the act of 1881, the judgments recovered by Platt, the creditor, against the town of Orleans are conclusive upon the town of Orleans, and it is the duty of the board of supervisors of Jefferson county to apply the provisions of the law relating to the collection of judgments, and to place upon the schedule of the town a sum sufficient to pay and liquidate the judgments so recovered by Platt, the creditor. (*See agt. Board of Supervisors of Jefferson county, ante, 201.*)

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TRADE MARK.

1. The plaintiff, who first applied the word "Vienna" to baked bread and other articles, having been engaged in the manufacture in the city of New York of an article known as "Vienna bread," and which he has for many years past sold with a label thereon containing the words "Vienna Model Bakery," can maintain an action restraining the use by other parties of a label in imitation of his own, and in particular from applying the "Vienna" to baked articles. (*Fleischmann* agt. *Schuckmann*, ante, 92.)

See ASSIGNMENTS.

Matter of Swezey, ante, 215.

TRESPASS.

1. In a case of public necessity to prevent the spreading of a fire any individual may demolish a building without being responsible in trespass or otherwise. (*Struve* agt. *Droge*, ante, 233.)
2. If, however, such public necessity does not exist, and in point of fact there is no need of the destruction, the person who commits the act is responsible in damages. (*Id.*)
3. But see *The People* agt. *Shorter*, (2 N. Y., 193). (*Id.*)
4. A plaintiff can have but one suit growing out of a single cause of damages, and after a recovery in an action for an injurious act no action can be maintained on account of any further consequences occasioned by that act. Damages for a single wrongful act can be awarded but once, and in one suit only. When sued for such wrongful act the plaintiff may recover his damages caused thereby, both past and prospective; that is, he takes his equivalent for the entire injury in damages. He

cannot split up his damages and have separate and independent recoveries. (*Law* agt. *McDonald*, ante, 340.)

5. A judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings upon which it is rendered, whether the suit embraces the whole or any part of the demand constituting the cause of action. An entire claim arising, either upon a contract or from a wrong, cannot be divided and made the subject of several suits, and if several suits be brought for different parts of such claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (*Id.*)
6. Where A. had recovered against B. in his former actions the damages to which he was entitled for all unlawful acts committed by him against A.'s rights prior to October 15, 1875, which acts were the removal of and injury to A.'s pipe leading from a spring to his dwelling and out-houses, and the consequent interruption of the flow of water through it to his premises; and, by the judgment in the first action, he was awarded a perpetual injunction against B., restraining the latter from in any way interfering with such pipe. Prior to the recovery in the former actions, and in 1872, A. attempted to replace and repair the pipe and was prevented from so doing by B., but no such attempt was thereafter repeated until in the spring of 1877, when no opposition was offered; nor did the defendant since 1872 at any time or in any way interfere with the plaintiff's rights as they were ultimately established by the judgment of the court in those suits. The second action was commenced October 15, 1875. In a third suit brought by A. a judgment was awarded against B.

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for damages which occurred between October 15, 1875, and the 1st day of May, 1877, by reason of the defendant's wrongful act in removing the pipe from the spring and preventing A. from repairing the pipe:

Held, that such recovery could not be sustained. These causes of damage, and each of them, were especially commented on in the former actions, and damages were awarded in both suits. Those recoveries must be presumed to embrace all damages to which the plaintiff was entitled growing out of those wrongful acts, past and prospective, and the present recovery is barred by the former. (*Id.*)

TRIAL.

1. Plaintiff's sleigh was upset by striking a switch in defendant's road. In an action to recover damages, after the court had charged, in substance, that the switch used was not in itself objectionable, but was only so if found by the jury to have been, at the time, too high to be compatible with defendant's right to a reasonable use of the street and to have been an obstruction, was asked by defendant's counsel to instruct the jury, that defendant was not chargeable with negligence in putting down the switch he did, that the switch used was not an obstruction in law, properly laid. The court replied it would leave that to the jury:

Held, that the request and answer must be considered in view of what the court had already charged, and so considered was not error. (*Wooley* agt. *Grand St. &c., R. Co.*, 83 N. Y., 121.)

2. An action to recover a deficiency arising on foreclosure was noticed and moved for trial at special term. Before the counsel for plaintiff opened his case, defendant's counsel "objected to the

jurisdiction of the court and demanded a jury trial." The court reserved its decision, and the parties proceeded with the trial; evidence was given on both sides and the case submitted to the court. It did not appear, by the case, that either party asked the court to decide the question so reserved or objected to, finishing the trial before him :

Held, that the action was one at law, and defendants were entitled to a jury trial; but that by completing the trial without insisting upon a ruling as to their right to a jury, they waived that right. (*Hand* agt. *Kennedy*, 83 N. Y., 149.)

3. Also, *held* that an exception, filed after the decision of the action, to the failure of the court to decide the question was not available. (*Id.*)

4. *It seems*, that defendants should have insisted upon a ruling, and if the court ruled adversely to them, or if it declined to rule at all, or reserved its decision, should have excepted; or as soon as the nature of the case was developed, should have insisted upon a ruling and taken an exception. (*Id.*)

5. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter, the witness becomes his own. (*People ex rel. Phelps* agt. *Oyer and Terminer*, 83 N. Y., 436.)

6. The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. (*Id.*)

7. Where this limitation has been regarded, this court cannot inter-

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ferre, save where there has been an abuse of discretion. (*Id.*)

8. In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. (*Cowley agt. People*, 83 N. Y., 465.)

9. In an action for negligence against a municipal corporation it appeared that the injury was caused by the wheel of the wagon in which plaintiff was riding running into a hole in a street. The court, after it had charged, in substance, that plaintiff could not recover if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son, and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. At the close of the charge of the court, defendant's counsel excepted to the court's "statement to the jury of the evidence, or the supposed evidence connected with the accident," on the ground that it was "stated too strongly."

Held, that the exception was not sufficient to bring up any question for review. (*Minick agt. City of Troy*, 83 N. Y., 514.)

10. Where, in the complaint and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be in-

valid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the true owner conceded and the claim reduced to one of lien. (*Hudson agt. Swan*, 83 N. Y., 552.)

11. Although the plaintiff in an action fails to make out his cause of action on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defense set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a nonsuit, not to a verdict. (*Briggs agt. Waldron*, 83 N. Y., 582.)

See Costs.

Washburn agt. Oliver, ante, 482.

TRUSTS.

1. Where the plaintiff's complaint alleged that the defendants jointly agreed that each should hold in trust for plaintiff twenty shares of stock of a corporation, until the dividends which might be realized on the forty shares should amount to the price of the shares of the stock, and that one of the defendants sold the twenty shares held by him, in trust, to his codefendant:

Held (overruling demurrer to the complaint), that though not enough is shown to call upon defendant for a specific account, the action is proper to the extent of obtaining a judicial determination as to the existence of a trust with respect to the twenty shares which one defendant sold to the other, as with knowledge of the trust such defendant could not purchase to his own use these shares. (*Magauran agt. Tiffany*, ante, 251.)

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TRUSTEE.

1. Where, in a will, the testator directs his estate to be divided into a certain number of shares, and that one of said shares shall be held in trust to keep the same invested and to receive the rents, income and profits thereof, and pay the same over to the beneficiary named as they accrue and are collected, and the property devised by the testator is not invested in securities recognized by the rules of law applicable to investments by trustees, the trustee must sell and re-invest in accordance with such rule. (*Goodwin* agt. *Howe*, ante, 134.)

See WILL.

Hancox agt. *Meeker*, ante, 336.

UNDERTAKING.

1. The defendant having been ordered to be relieved from a default to file an undertaking conditioned to pay any judgment that might be recovered, with two sureties justified:

Held, that he complied with the order by filing an undertaking justified before the county judge of Jefferson county, the county of their and the defendant's residence. (*Stern et al.* agt. *Staples*, ante, 380.)

2. Every justification made before the county judge of the parties' residence is good. (*Id.*)

See ATTACHMENT.

Baere agt. *Armstrong et al.*, ante, 515.

See APPEAL.

Struve agt. *Droge*, ante, 258.

See STIPULATION.

Schuyler agt. *Englert et al.*, ante, 479.

3. The plaintiff having recovered a judgment by default for \$150 and

costs in a justices' court against one Ross, the latter appealed to the county court, stating in his notice of appeal that he would move for a new trial before the same justice, upon affidavits showing that manifest injustice had been done and excusing his default. In order to stay the issue of an execution upon the judgment he procured the defendant to give an undertaking conditioned "that if judgment be rendered against the appellant on said appeal, and execution be returned unsatisfied in whole or in part," he would pay the amount unsatisfied.

Upon a new trial ordered by the county court the plaintiff again recovered a judgment for \$148 and costs, which was, upon an appeal taken by Ross, affirmed by the county court.

This action was brought upon the undertaking, by the plaintiff, after an execution issued upon the judgment had been returned unsatisfied, and after ten days' notice had been given to Ross:

Held, that the defendant's liability was not terminated by the granting of the new trial, but that the condition of the undertaking referred to the final determination of the appeal and that the plaintiff was entitled to recover. (*Lowry* agt. *Tew*, 25 *Hun*, 257.)

4. Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (*sec.* 338), containing, among other things, this provision, that "during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon." The judgment appealed from was affirmed by the general term. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending, W., who

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remained in possession, committed waste. In an action on the undertaking, given on appeal to the general term :

Held, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the supreme court. (*Church agt. Simmons*, 83 N. Y., 261.)

5. *It seems* that if after judgment of affirmance the defendant had continued in possession by permission of the plaintiff, under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. (*Id.*)

6. *It seems* also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. (*Id.*)

7. *It seems* also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal. (*Id.*)

UNLAWFUL ACTS.

See TRESPASS.

Law agt. McDonald, ante, 340.

USES AND TRUSTS.

See ANSWER.

Perry agt. Foster, ante, 228.

VENUE.

1. As an action under the manufacturing act (*sec. 15, chap 40, Laws of 1848*), against an officer of a cor-

poration organized under it, to recover a debt of a corporation, on the ground that such officer has signed a false report, is a penal action, it is local (*Code of Civil Procedure, sec. 983*) and must be tried in the county where the cause of action or some part thereof arose. (*Veeder agt. Baker*, 83 N. Y., 156.)

2. As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. (*Id.*)

VOLUNTARY ASSOCIATIONS.

1. An action may be maintained against the president of a voluntary joint association by an expelled member thereof, to compel his restoration to membership. (*Fritz agt. Muck, ante*, 69.)

2. The object is to place himself in a position where he can reach the joint property; and in this view the action is in regard to the joint property and rights of the association, and is within the purpose designed to be accomplished by the acts of 1849 and 1851, and that was, that where an association of the character there specified was liable to be sued it should not be necessary to make all the members parties. (*Id.*)

3. The propriety of the expulsion may be reviewed in such suit. (*Id.*)

4. Although the rules of the association did not provide that notice should be given, they were in this respect unreasonable and the member to be expelled should have notice and an opportunity should be given to him to be heard. (*Id.*)

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5. The right to recover certain weekly payments which were suspended by the expulsion will not be passed upon by the court. (*Id.*)

WILL.

- 1 Where, in a will, the testator directs his estate to be divided into a certain number of shares, and that one of said shares shall be held in trust to keep the same invested and to receive the rents, income and profits thereof, and pay the same over to the beneficiary named as they accrue and are collected, and the property devised by the testator is not invested in securities recognized by the rules of law applicable to investments by trustees, the trustee must sell and reinvest in accordance with such rule. (*Goodwin* agt. *Hove*, ante, 134.)
2. The plaintiff, as vendor, sues for the specific performance of a contract by defendant for the purchase of real estate sold by plaintiff, as executor of the two estates of Eliza and Maria, daughters of Henry Mott. By Henry Mott's will, his estate, real and personal, was vested in trustees. In distinct clauses, he directed them to "stand seized and possessed of one-third part thereof," upon trust for the use of each of three daughters, "during her natural life," and if she "shall be single and unmarried at her death," then "upon such trust, and for such purposes as she shall or may appoint by her last will." The daughters died without issue, and each were single at her death. Maria, the last survivor, was a widow, and neither of the others had ever married. Eliza and Maria each left a will giving a power of sale to her executors:
- Held*, that plaintiff, as surviving executor of Eliza and Maria, respectively, had authority to sell this real estate, and by his deed as executor to convey a good title to

the purchaser. (*Onderdonk* agt. *Ackerman*. ante, 318.)

3. The testator, by a clause of his will, directs his executors, after paying certain debts and charges, to divide the residue of his estate into eight equal shares, and invest the same separately, each of eight children to have the income of one share for life, the principal sum, upon the death of each child, to go to his or her issue; and in the closing part of the clause the executors are authorized to lease the real estate, and after the death of his wife to sell and convey the same for such prices and upon such terms as they might deem best for the interests of his estate. In an action by one of the children, after the death of the widow, against the sole surviving executor, to compel him to make the division or sale and investment provided for in the will:

Held (overruling demurrer to complaint), that the selection of a proper time for the execution of the trust is not within the discretion of the executor; that the trust to divide, invest and sell constitute an equitable conversion of the realty into personalty from the death of the widow; and the trustee should at that time, in the execution of the trust, get the best prices in the disposition of the realty, and that will meet the exigencies of the will. (*Hancox* agt. *Meeker*, ante, 337.)

WITNESS.

1. The Code of Civil Procedure was intended to apply only to civil actions and proceedings, except where otherwise provided; and section 832, declaring "a person who has been convicted of crime or misdemeanor" to be, notwithstanding, a competent witness, before the amendment of 1879 making such convict "a competent witness in a civil or crim-

Digest.

inal action or special proceedings," did not remove the statutory disqualification as a witness of a person convicted and sentenced for a felony. (*Perry* agt. *The People*, ante, 148.)

2. Though the record is the best evidence of a conviction, yet although no foundation has been laid for secondary evidence, if

without objection from either witness or party the fact of such conviction is proved by parol, and is not disputed, it cannot be disregarded. (*Id.*)

3. An executor of a will is a competent witness to prove its due execution, although not a subscribing witness. (*Rugg* agt. *Rugg*, 83 N. Y., 592.)

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ERRATA.

In the case of *Potter* agt. *Neal* (*ante*, page 158) for "Potter" read *Patten*.
On page 162, thirteenth line from bottom, in place of the word "be"
read *lie*.

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